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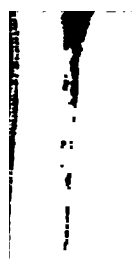
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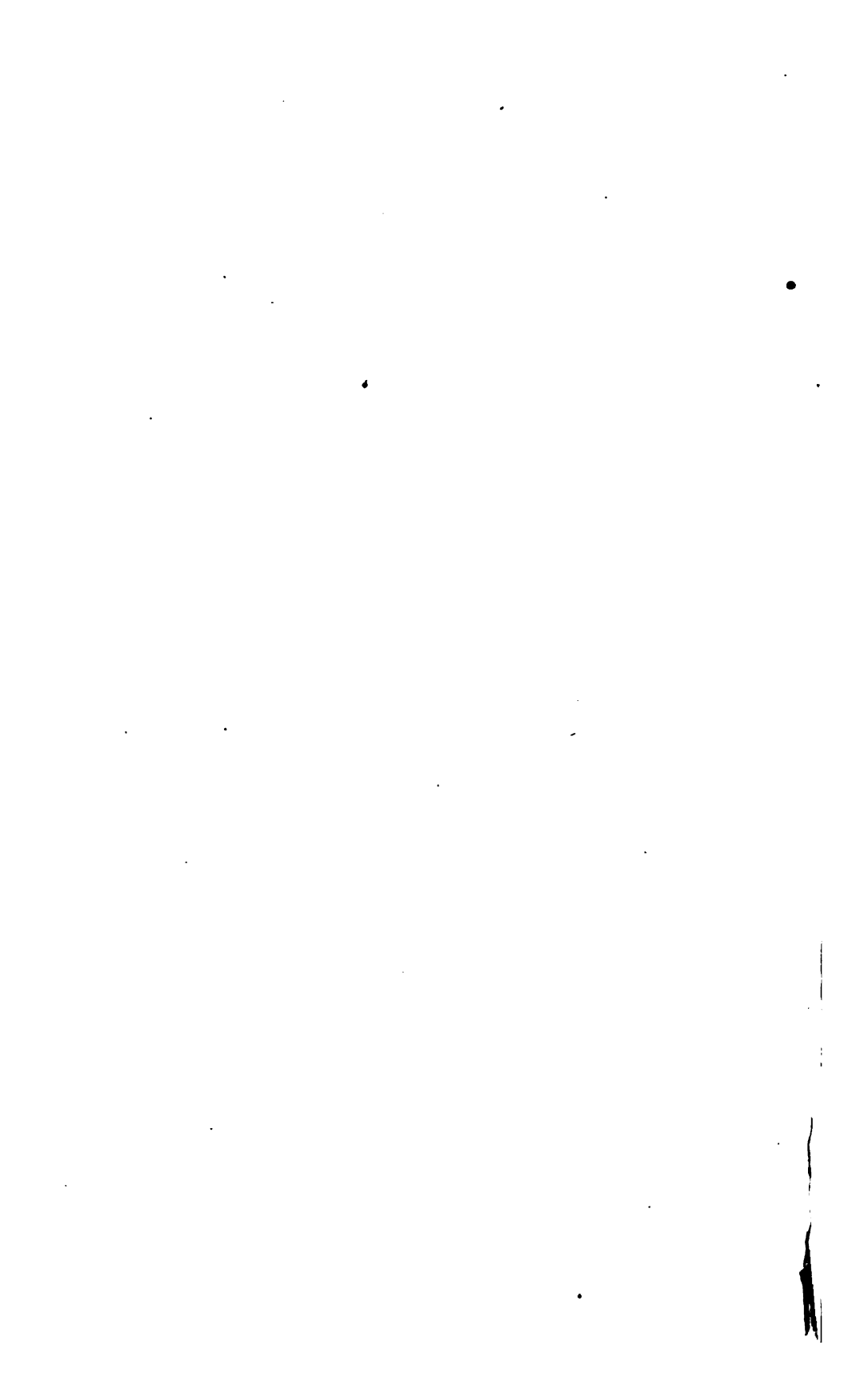
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LOUISIANA
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REPORTS
OF
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IN THE
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OF
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JUDGES
OF
THE SUPREME COURT.

HON. JOHN T. LUDELING, CHIEF JUSTICE.

HON. J. G. TALIAFERRO,	}	ASSOCIATE JUSTICES.
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. P. H. MORGAN.		

A. P. FIELD, ATTORNEY GENERAL.



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E. H. Parrot

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

JANUARY, 1875.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. P. H. MORGAN.

Associate Justices.

No. 4829.

MRS. JOSEPHINE DECUIR v. JOHN G. BENSON.*

The act of the Legislature of Louisiana, No. 38 of the session of 1869, is not in conflict with article 1, section 8, of the constitution of the United States, nor is it in conflict with article 14, section 1, of said constitution. Act No. 38 does not undertake to regulate commerce. The first section of act 38 forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race and color. That is the substance of the section so far as applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States within the limits of Louisiana, from the effects of prejudice against them. It was not in any manner to affect the commercial interests of any State or foreign nation, or of the citizens thereof.

The above mentioned act, No. 38 of the session of 1869, does not violate section 1 of article 14 of the constitution of the United States. No one is deprived of life, liberty, or property, without due process of law by said statute. The position that, because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he pleases, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy.

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not. But the act is in perfect accordance with the constitution of the United States.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law is reasonable.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*,
J. E. K. Washington, S. R. Snaer, for plaintiff and appellee.
Bentlnck Egan, for defendant and appellant.

LUDELING, C. J. The plaintiff alleges that in July, 1872, being in the city of New Orleans, and desiring to go to her plantation, in the parish of Pointe Coupee, she went on board the steamboat Governor Allen, a packet engaged in the business of common carrier of passengers, and plying between New Orleans and Vicksburg, and that she was refused a berth in the cabin and denied the right to take her meals at the table with the other passengers; and that she was forced to remain in a small compartment in the rear of the boat, without the common convenience granted to other passengers, solely on the ground that she is a colored person. She alleges that she is well educated, resided in Paris, France, several years, and that the treatment above mentioned is not only a gross infraction of her rights under the constitution and laws of the United States and of this State, but was also an indignity to her personally, which shocked her feelings and caused her mental pain, shame and mortification. She prays for \$25,000 actual damages and \$50,000 exemplary damages.

The defendant filed an exception, in which he pleaded want of jurisdiction in the State court *ratione materiae*, as, he alleges, "the matters set up are admiralty matters, over which the United States Court alone has jurisdiction." This plea was overruled, and the other parts of the exception were referred to the merits. In his answer the defendant reiterates the objections urged in his exception. They are as follows:

First—A general denial.

Second—That the steamer Governor Allen was on the twentieth July, 1872, and had been some years before, enrolled and licensed under the laws of the United States to pursue the coasting trade, and was in the month of July, 1872, actually engaged in commerce and navigation between the ports of New Orleans and Vicksburg, in the State of Mississippi, and that the 13th article of the Constitution of the State of Louisiana, and the act No. 38 of 1869, of said State, so far as they attempted to regulate steamboats, are in conflict with article 1, section 8, of the constitution of the United States, giving Congress exclusive power to regulate commerce among the several States, and are consequently null and void.

Third—That he has by law a right to regulate and prescribe rules for the accommodation of passengers on the steamer Governor Allen; that the boat is private property, and does not belong to the public, and any law attempting to prevent him from regulating said steamboat to the best advantage, and for the interest of her owner, would be in violation of article 14, section 1, of the amendment to the constitution of the United States, prohibiting any State from depriving any person of his property without due process of law.

Fourth—That there is now and always has been a well known regu-

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lation on the steamer Governor Allen, as well as all other boats engaged in commerce and navigation between the port of New Orleans and the various ports and places on the Mississippi and tributary rivers; that colored persons are not placed in the same cabin as white persons, or allowed to eat at the same table with them; that this regulation is reasonable, usual and customary, and is made for the protection of their business, and was well known to the plaintiff in this cause in July, 1872, and had been known to her for many years previous.

Fifth—That the steamer Governor Allen has a cabin called the Bureau for exclusive accommodation of colored persons; provided with state rooms and all the conveniences of the cabin appropriated for the exclusive use of white persons; that plaintiff was tendered a state room in said bureau cabin appropriated for the exclusive use of colored persons, according to the well known rules and regulations of the boat; and instead of accepting it, took a seat in the recess of the boat in the rear of the ladies' cabin, where she was offered a stretcher, which she declined.

Sixth—That she was distinctly informed before she came on the boat by the clerk to a person who applied to him on her behalf that she could not be accommodated in the cabin for white persons, but would be put in the bureau or cabin for colored persons, and that she came on the boat with that understanding and without complaint, and only paid \$5—the amount charged in said cabin—and that the other passengers are charged \$7 to Hermitage Landing.

There was judgment in favor of the plaintiff for one thousand dollars, and the defendant has appealed.

We think the exception to the jurisdiction of the court was properly overruled. See 20 An. 432, and 22 How. 244.

The evidence sustains the material allegations of the petition. The defendant himself, a witness in the case, states: "I would not have given her a room if they had not all been taken." He had previously stated that he did not know if there was a vacant room—that he thought there were unoccupied berths in some of the rooms. When asked if the reason for refusing to give her a berth in the cabin was on account of her being a colored person, he answered: "Yes, sir, as being contrary to the rules of the boat."

Two constitutional questions are presented for solution: Is the act of 1869, No. 38, in conflict with article 1, section 8 of the constitution of the United States? Is it in conflict with article 14, section 1, of said constitution?

It is insisted that act No. 38, of the General Assembly passed in

1869, violates article 1, section 8, of the constitution of the United States, because it undertakes to regulate commerce.

This is a mistake. The act does not make any regulation of commerce. The act was passed to carry into effect the provisions of article 13 of the State constitution, which declares that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons without distinction or discrimination on account of race or color." The act contains five sections. The first and fourth alone are applicable to this case.

The first section provides "that all persons engaged within this State in the business of common carriers of passengers shall have the right to refuse to admit any person to any railroad cars, street cars, steamboats or other water crafts, stage coaches, omnibuses or other vehicle, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business after such rules and regulations shall have been made known; *provided*, said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance when there is not room or suitable accommodations; and except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever."

The fourth section provides "that for a violation of any of the provisions of the first and second sections of this act, the party injured shall have the right of action to recover any damages, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction."

The first section forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race or color, and that is the substance of the section so far as it is applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States, within the limits of Louisiana, from the effects of prejudice against them. It does not, in any manner, affect the commercial interest of any State or foreign nation or of the citizens thereof.

The objection that the act No. 38 violates section 1 of article 14 is utterly untenable. No one is deprived of life, liberty or property, without due process of law by said statute. The position that because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he chooses, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy. "The rights and responsibilities of the common carrier may be briefly stated thus: He is bound to take the goods of all who offer, if he be the carrier of goods, and the persons of all who offer, if he be a carrier of passengers; to take due care and to make due transport and due delivery of them. He has a lien on the goods which he carries, and on the baggage of the passengers for his compensation.

He is liable for all loss or injury to the goods under his charge, unless it happens from the act of God or from the public enemy." Parsons' Mercantile Law, 207.

If he be a common carrier of passengers he must receive all who offer, carry them over the whole route, demand only the usual compensation, and treat all alike, unless there be actual or sufficient reason for the distinction, such as the filthy appearance, dangerous condition, or misconduct of a passenger; and for failure in any of these particulars he is responsible to the extent of the damage occasioned thereby, including pain or injury to the feelings. *Chamberlain v. Chandler*, 3 Mason, 142; 5 La. *Keene v. Lizardi*, 431; *Black v. Bannerman*, 10 An. 1; 1 McLean 550; 3 McLean, 24 Parsons' Mercantile Law, 207; 3 Kent ed. 1832, 160.

In *Keene v. Lizardi*, Judge Porter, as the organ of the court, quoted the following language of Judge Story, as expressing the ideas of the court on this subject. "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. The contract with him is not for mere ship room, and personal existence on board, but for reasonable food, comforts, necessities and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for the decency of demeanor, which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings, which aggravates every evil, and endeavors by the excitement of terrors and cool malignancy of conduct to inflict torture on susceptible minds."

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not; but the act is in perfect accord with the constitution of the United States.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, etc." Fourteenth amendment of the constitution of the United States.

It is settled, in this State at least, that colored persons now have all the civil and political rights which white persons enjoy. See *succession of Caballero and Hoss & Elder v. Hart et al.* 25 An.

Mrs. Decuir was denied the right to go into the ladies' cabin. She was compelled to remain in a small compartment back of the ladies' cabin, or to go into the "colored bureau," and to take her meals there also. If she had been a white lady, it will not be denied that she would have had just cause for complaint. Under the constitution and laws of the United States and of this State, she was entitled to the same rights and privileges, while upon the defendant's boat, which were possessed and exercised by white persons. In a recent case, Chief Justice Beck, of Iowa, held the following language, which we adopt: "These rights and privileges rest upon the equality of all before the law, the very foundation principle of our government. If the negro must submit to different treatment, to accommodations inferior to those given to the white man, when transported by public carriers, he is deprived of the benefits of this very equality. His contract would not secure him the same privileges and the same rights that a like contract made with the same party, by his white fellow citizen, would bestow upon the latter." *Cager v. Northwestern Union Packet Company*, *American Law Register* for March, 1874.

The defendant relies also upon the fact that, by regulation and the established course of business on steamboats, colored persons were not received as cabin passengers, and not allowed the use of the cabins; that they have the right to make regulations for the comfort and convenience of the passengers, and that said regulation was reasonable.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law, is reasonable.

The appellee has not asked for an increase of the judgment.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

WYLY, J., *dissenting*. Article 13 of the constitution provides that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character." * * * * *

Act No. 38, of the acts of 1869, an act to carry said article into

effect, provides in substance that, for certain causes, (such as improper conduct, infamous character, or refusal to pay the fare), all persons engaged in the business of common carriers shall have the right to refuse to admit passengers or to expel them from their steamboats or other water crafts, railroad cars or other vehicles; *provided*, they make no distinction on account of race or color. And for violating this provision, the party injured shall have the right to recover any damage, exemplary as well as actual, which he may sustain.

Assuming that the meaning of this legislation is that no colored person shall be excluded from the cabin and table of a steamboat, usually occupied by white passengers, and, if so excluded, he shall have the right to recover damages on account thereof, the question is, were these enactments obligatory on the steamboat Governor Allen, engaged in carrying passengers and freight between New Orleans and Vicksburg, Louisiana and Mississippi?

Was the steamboat Governor Allen, engaged in commerce between the States under a license issued by the United States, bound to observe this local or State legislation regulating the entertainment of passengers, requiring them to set at the same table and occupy the same cabin?

This legislation being in force, could the Governor Allen provide for her passengers two cabins and tables affording equal accommodations, one exclusively for white passengers and the other exclusively for colored passengers, and having so provided assign each passenger to his proper place?

I speak not now of the right resulting from a contract, express or implied, between the passenger and the boat; because if the boat contract to carry a colored passenger in the white cabin, and fails to do so, it will be responsible for a breach of that contract.

Such a contract would depend for its existence in no manner upon the legislation to which I have referred.

The inquiry is, has the State of Louisiana authority to make it unlawful for a steamboat engaged in commerce between the States, to provide separate cabins and accommodations for the white and colored passengers?

In my opinion she can not do so, without encroaching upon the power conferred by the constitution of the United States upon Congress, to regulate commerce among the States.

If Louisiana can require the passengers to be mixed, and make it unlawful for the whites to be assigned to one cabin and the colored to another, why may not Mississippi require the white and the colored passengers to have separate apartments and make it a penal offense for them to be mixed in the same cabin?

If one State has jurisdiction on the subject, why has not the other?

If each have jurisdiction, each can pass just such laws as it deems necessary in the premises. Now what would be the consequence of such a state of affairs? The result would be that the boat could carry no passengers. If it should carry passengers mixed in the same cabin, conformably to the laws of Louisiana, it would incur the penalty prescribed by Mississippi for mixing white and colored passengers.

If the States have authority to pass conflicting laws, which in effect would prohibit the transportation of passengers on steamboats from one State to the other, why may they not enact similar laws in regard to freight?

And if they can legislate upon the subject of passengers and the subject of freight, passing on steamboats between the States, are they not in effect regulating commerce among the States, in contravention of the constitution of the United States?

It was to prevent this very conflict of authority between the States, that the founders of our government wisely provided that Congress alone should have power to regulate commerce among the several States.

I can not regard the constitutional provision and the statute of this State, as applied by the majority of the court in this case, otherwise than as enactments of a State to regulate commerce between the States, in contravention of the constitution of the United States. They are in no sense enactments springing from the exercise of police power, because the police power of a State can not extend beyond its own limits. It can not be brought into activity to regulate commerce between the States, to prescribe how freight shall be carried or passengers accommodated upon steamboats running from one State to another.

Having shown, as I think, conclusively, that the enactments of Louisiana, as applied in this case by the majority of the court, contravene the constitution of the United States, I think I may safely affirm that it was not unlawful for the Governor Allen to have two separate cabins and tables, one for the white and the other for the colored passengers, affording like accommodations to each; and in assigning each passenger to his proper place the captain or clerk committed no illegal act.

If there was no law prohibiting the universal custom of steamboats in this trade from having separate cabins for the white and colored passengers, that custom surely was not an unlawful custom.

I entirely agree with our learned brother below, that every custom must yield to positive law; and it was useless for the defendant to prove a custom contravening a prohibitory law.

But the precise question is, was the custom, which the defendant

proved by overwhelming evidence to be universal among all the boats navigating the lower Mississippi, an unlawful custom; was it a custom in contravention of a prohibitory law?

Laying out of view the enactments of Louisiana, which, I think, I have fully shown have no application to boats like the Governor Allen, engaged in commerce between the States, I boldly assert that the custom in question was not unlawful, that it contravened no prohibitory law.

Now let us examine the testimony of the witnesses in regard to the custom or regulation to which I have referred.

Thomas P. Leathers, a witness, says: I have been engaged in steamboating for the last thirty-six years; my principal trade has been between New Orleans and Vicksburg, Mississippi; have been running boats there for the last thirty-three years as master; I am now master of the steamer Natchez, a weekly packet between New Orleans and Vicksburg; was on the steamer Governor Allen when Mr. Washington came on board and applied for a passage for some person—did not see who; heard the clerk of the boat tell him that if she was a colored person she could only be accommodated in the colored cabin; think this was in July, 1872; the Allen was then running in place of my boat, the Natchez, carrying the mail; heard nothing more; this was Saturday evening before the boat backed out from the wharf; witness went with the boat to Carrollton; witness is familiar with the custom and regulation of steamboats carrying colored persons; it is usual to have a colored cabin for their accommodation, separate and distinct from all others; this custom is well known among all persons traveling upon the river, both white and black; it is a reasonable regulation, and prevails among all boats coming to this port; the colored passengers on my boat are accommodated as well as the white, and are provided with the same bill of fare, but distinct and separate apartments; the rule on my boat is to keep the officers in a separate cabin; the waiters have a separate one; the ladies have a separate one; the gentlemen have a separate one; the ladies' servants have a separate one, and the colored passengers another; each one is separate and distinct from the others, and have separate tables; the steamboat Governor Allen is regulated the same way my boat is regulated. This regulation and custom among steamboats coming to this port of keeping the white and colored cabin passengers separate, has prevailed ever since I have been steamboating; I have never heard of any other; this regulation is made for the accommodation of the whole traveling community, because there are a large majority of white people who do not wish to be mixed up with the colored people, and the colored people do not wish to be mixed up with the white people; it would be

impossible to run a steamboat without this regulation; it is just as essential as to keep the gentlemen and ladies' cabin separate; I think the colored travel in my trade is between a fourth and fifth of the whole, that is, the white persons traveling are about four-fifths of the whole, or near that; about one-half that travel is for pleasure; if I did not have rules and regulations for my boat, and accommodation of my passengers, I do not think I would have any, either white or colored; the white passengers are charged about twenty-five per cent. more than the colored, though they get the same accommodation; Lieutenant Governor Dunn was a passenger on my boat just before his death; I gave him a state room in the colored cabin, where he preferred to be, as he asked for it; I have also had senator Revels travel on my boat, and he informed me that the separate cabin was the only way to give satisfaction to the white and colored race; that they must be kept separate; he was always accommodated in the colored cabin; I have also frequently had other colored members of the legislature, of both Louisiana and Mississippi, and always put them in the colored cabin, and never heard of any complaint from them on that score.

John W. Cannon, states in substance, that he is master and owner of the steamer R. E. Lee, and owner of her and the steamer Katie; that he has been steamboating as master and owner for the last thirty-six years, in nearly all trades out of New Orleans, and has been in the Vicksburg and bend trade for the last fifteen or eighteen years, except during the war, making about a trip a week; that he is familiar with the custom of carrying colored passengers; that they are always carried separate and apart from the white people; that they were carried in the "nursery" until the boats got what was called the colored cabin, under the ladies' cabin; that this regulation in regard to carrying colored persons is well known; that they are never carried in any other way; that since the war he has had the Quitman, the Grey Eagle, the Governor Allen, the Belle Lee, the Pargoud, the Magenta, the R. E. Lee and the Katie—all first class boats, with the exception of the Grey Eagle, and she was a comfortable passenger boat; that this regulation of keeping the colored and white passengers separate is well known to the traveling community, and is for the protection of their business; that white people would not travel on a boat if they knew negroes were put in the same cabin with them or even that they had stayed in the same state rooms where the white people would have to sleep after them, the prejudice in the public mind being so strong; that the colored passengers are treated the same as the white; they have the same food and attention; get their meals at the same time and have servants to wait upon them; that the Governor Allen has a

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very comfortable bureau, and as good rooms as she has got above; there are some twelve or fourteen of them, and some very large ones; that he has never known any boats to put negroes in the cabin or at the white table; that they could not get along without observing this rule strictly; that the Lee generally carries from thirty to two hundred and thirty or three hundred passengers; has generally from seventy to eighty and one hundred; supposes about a third of them colored.

Captain John G. Benson, the defendant, states in substance, that he has been steamboating off and on since 1848, and for the last three or four years has been running in the New Orleans and Vicksburg trade; that the clerk of the boat came to him after the boat had backed out and said there was a woman on board of the boat disposed to make a little trouble if she could; that she was registered to get off at Hermitage Landing; that the passage of a white person to that landing was seven dollars and a colored person five; that there is a regulation on his boat to keep the white and colored people separate, by having a cabin for the colored people separate from the white; that this is a regulation prevailing on the river; that the object of it is to protect a person in his business; that if a person adopted any other, and allowed negroes to occupy rooms in the main cabin, he would not carry any other people; that this regulation is for the accommodation of the traveling public; that the average colored travel is from a fourth to a fifth of the white; that this regulation of keeping the colored people separate from the white is well known to the traveling community; that it has prevailed on the river since he has been on it; that he has a colored cabin on the steamer Governor Allen, called the "bureau," where they get precisely the same attendance, food and accommodation as the white passengers, and are charged from a fourth to a fifth less.

A large number of witnesses were examined, and they all concur as to the universality of the regulation or custom prevailing on all the boats navigating the waters of the lower Mississippi, that white and colored passengers are accommodated in separate apartments; and they state that this rule or custom was well known to the traveling public generally. This regulation was known to the plaintiff. Her counsel went to the clerk of the boat before the hour of departure to endeavor, in her case, to get him to vary from that custom, and to allow her to travel in the same cabin with the white passengers. This request was peremptorily refused.

About the time, however, the boat was backing out, the plaintiff came aboard, and being refused accommodation in the white cabin she remained in the room known as the recess, in the rear of that cabin, during the trip, refusing to accept the accommodations tendered her in the colored cabin. Just before arriving at her place of destination

(the Hermitage Landing) the plaintiff went to the office and settled her fare, paying five dollars, the usual charge for colored passengers, the rate for white passengers being seven dollars.

Now, the question is, when the plaintiff went aboard the "Governor Allen," as a passenger, in July, 1872, what was the implied contract arising between her and the boat or the defendant, the captain? Was the implied contract the securing of a passage in the white or colored cabin? In my opinion the contract was made in reference to the custom of that boat and all others carrying white and colored passengers. Entering that boat as a colored passenger, in view of the well known regulation referred to, the plaintiff tacitly consented to take accommodation in the colored cabin. And the obligation of the defendant was to furnish her as good a room and as good fare in that apartment as he gave to any passenger on the boat.

Now, the complaint is not that the accommodation in the colored cabin was not as good as it was in the white cabin (and the proof is there was no difference in the comforts of the two apartments), but it is because there was a discrimination on account of color, and the plaintiff was denied entertainment in the same cabin with the white passengers.

The basis of plaintiff's action is a breach of contract, and on account thereof she claims damages to the amount of seventy-five thousand dollars. But the difficulty in her case is, she had no contract for passage in the same cabin with the white passengers, and being excluded therefrom, there was no breach of contract on the part of the defendant, and consequently there is no ground either for the amount of damages claimed by her or for the amount of \$1000, awarded by the court *a qua*.

If the clerk of the boat, when applied to by the counsel of the plaintiff, had consented to give the plaintiff accommodation in the white cabin, and afterwards refused to allow her to occupy the same, there would be a strong case in favor of the plaintiff to claim damages for breach of contract; and the authorities relied on by plaintiff, with so much confidence, to wit: *St. Armand v. Lizardi*, 4 La. 244, and *Keene v. Lizardi*, 5 La. 431, and 6 La. 319, would be applicable. Those authorities and that of *Chamberlain v. Chandler*, 3 Mason, 142, are correct expositions of the law most eloquently expressed, in regard to the responsibility of owners for the breach of duty by their officers, showing that they are responsible even for the mental suffering occasioned by the injustice and disrespectful and brutal conduct of said officers.

I fully indorse what is said in those cases, believing that part of the contract between the passenger and the boat or its owners, is an implied stipulation for the good conduct and proper behavior of their

officers. If there is a breach of contract in this respect or any other respect, damages may be claimed on account thereof.

If there be a breach of contract in the case at bar, of course the plaintiff can claim damages. But if the custom or regulation in regard to the mode of carrying colored passengers to which I have referred, be not unlawful, on entering the boat as a passenger, the plaintiff impliedly accepted the defendant's offer to carry colored passengers in pursuance of that regulation, and she impliedly consented to take accommodation in the colored cabin. The defendant held himself out as prepared to take colored passengers, subject to a certain regulation universally prevailing on all boats navigating the waters of the lower Mississippi; and when a colored passenger entered his boat, the "Governor Allen," the implied contract was that his passage should be in the colored cabin. When a white passenger entered it, the implied agreement was that he should be accommodated in the white cabin, and if denied accommodation in the colored cabin he could not claim damages for breach of contract. It was the duty of the defendant, however, to provide suitable accommodations, and to make each cabin equally comfortable, and this he is shown to have done.

In conclusion, I maintain there was no breach of contract if the regulation of the boat was not unlawful, because that regulation formed part of the implied contract which arose between the plaintiff and defendant, in July, 1872, when she entered the boat as a passenger. Laying out of view the enactments of Louisiana, which are not applicable to boats engaged in commerce between the States, I find nothing in the common law, which is the law of the United States, prohibiting boats from making regulations for the common benefit of all the passengers, from separating the white and the colored into different apartments, giving to each equal accommodations. This custom or regulation is proved to have existed at least for the last thirty years, and perhaps ever since the American people commenced to navigate the Mississippi river.

Congress, which alone has authority to regulate commerce among the several States, has not seen proper to enact a law making this custom or regulation unlawful, although the subject in the shape of the civil rights bill has been lately under its consideration. Until the lawgiver speaks, it is our duty to be silent. For this State to interpose its enactments, and for this court to apply them to a subject solely confided by the constitution of the United States to Congress, is a glaring usurpation of authority.

For the reasons stated, I deem it my duty to dissent in this case.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

No. 3513. ✓

C. S. SAUVINET v. JOSEPH A. WALKER.*

This court is not aware of the existence of any constitutional provision making it imperative upon the Legislature to accord a trial by jury in all civil cases. It was competent for the law making power to provide that cases like the present one should be tried without the intervention of a jury. Therefore it had the right to prescribe, as it did in this class of cases, that issues of the sort here presented should be tried by a jury, if any party to the suit pray for it; and to provide, in the event the jury do not agree, or fail to render a verdict either for the plaintiff or defendant, that the case be determined by the judge.

A PPEAL from the Eighth District Court parish of Orleans. *Dibble, J. Filleul*, for plaintiff and appellee. *A. A. Atocha, Hornor & Benedict*, for defendant and appellant.

TALIAFERRO, J. This is an action brought under the fourth section of the act of the Legislature approved twenty-fourth of February, 1869, entitled "An Act to provide for carrying into effect the one hundred and thirty second article of the constitution of the State."

The plaintiff alleges that on the twentieth of January, 1871, in company with two of his friends, he called at the coffeehouse of the defendant, and asked of the person in attendance to be furnished with refreshments, kept and sold here by the defendant, a duly licensed coffeehouse keeper; that he offered to pay the usual and customary price of such refreshments, and conducted himself in an orderly and respectful manner; that notwithstanding, the accommodations asked for were refused, and that he was ordered to leave the house; that this refusal and ill treatment arose from no other cause or reason than that the petitioner is a man of color, and on that account not to be furnished with the accommodations extended in that establishment to others. The plaintiff avers that from the indignity so wantonly offered to him his feelings have been greatly outraged, and for the illegal and unwarranted act of the defendant the plaintiff prays damages in the sum of ten thousand dollars.

The answer is a general denial. The case was tried before a jury, but there was a disagreement and no verdict rendered. The court thereupon, under the provisions of act No. 23 of the Statutes of 1871, rendered a judgment for one thousand dollars in favor of the plaintiff and the defendant appealed. There are numerous bills of exceptions found in the record, but their examination is not important in determining this case. Six of them relate to the formation of and the judge's charge to the jury; the other two relate to the admission of testimony and are not important.

There was no evidence introduced on the part of the defendant.

All the material allegations of the plaintiff we consider fully established. The plaintiff is shown to be a man of character and respectability; that he has frequently held public office, and that he is now

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and was, at the time he was refused refreshments in the defendant's coffeehouse or saloon, civil sheriff of the parish of Orleans. It is clear that the refusal of the accommodations asked for was made solely on the ground that the plaintiff is a man of color. The defendant has therefore incurred the penalty of the act of 1869—acts of 1869, p. 37.

We think the judgment of the lower court correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

HOWE, J., *dissenting*. The provision of the constitution and the statute under which this suit was brought should be enforced, so long as they are the law of this State. We can not treat them as dead letters; and the plaintiff has therefore a cause of action. But after hearing the dissenting opinion of Mr. Justice Wyly, I am inclined to agree with him that the damages are excessive.

WYLY, J., *dissenting*. I think the plaintiff had the right to be served at the barroom of the defendant; but I do not think the refusal ought to entitle him, a colored man, to greater damages than a white man ought to recover, it being no greater wrong to refuse a colored man than a white man. The question of color has nothing to do with the case. Nor is the position of the plaintiff of any consequence.

A citizen of the State has been refused entertainment at a public resort, and he claims exemplary damages under a statute highly penal in its character.

The jury could not agree upon a verdict, and under a special statute the district judge was authorized to dispose of the case. He imposed on the defendant \$1000 exemplary damages, no actual damages being shown.

I think the penalty wholly disproportionate to the offense. If, instead of refusing the plaintiff a drink merely, the defendant had seized a chair and beaten him half to death with it, the damages would probably not have exceeded \$250. Yet, is the right to enjoy the entertainment of a drinking saloon of greater moment or more sacred than the right of personal security from violence?

Grave offenders are rarely condemned to pay a larger penalty than \$1000, as the law is now administered; and yet, without any evidence of the ability of the defendant to pay the penalty, he is condemned to pay one thousand dollars for merely refusing to sell a drink, not probably worth more than twenty-five cents, and where no actual damage has resulted from the refusal. As the statute is highly penal, as there is no proof of the circumstances of the defendant, and as the damages imposed by the district judge are, in my opinion, unreason-

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able and oppressive, I believe justice requires that this case should be remanded for new trial by a jury.

To vindicate Mr. Sauvinet's civil rights it is not necessary to despoil the defendant or to impose on him a greater penalty than he can bear, the object of the law being to correct the abuse, not to bestow wealth upon the party injured, or to destroy the offender.

For these reasons I deem it my duty to dissent in this case.

ON APPLICATION FOR A REHEARING.

TALIAFERRO, J. In the application for a rehearing in this case, the question as to the constitutionality of the act of the Legislature under which the judgment against the defendant was rendered, is pressed upon the consideration of this court. We are not aware of the existence of any constitutional provision making it imperative upon the Legislature to accord a trial by jury in all civil cases. It was competent for the law-making power to provide that cases like the one before us should be tried without the intervention of a jury. Therefore it had the right to prescribe, as it did in this class of cases, that issues of the sort here presented should be tried by a jury, if any party to the suit pray for a jury; and to provide, in the event the jury do not agree, or fail to render a verdict either for the plaintiff or defendant, that the case be determined by the judge.

No facts appear on the record showing that the damages awarded are excessive.

The application for a rehearing is refused.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

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No. 4.77.

J. W. CANNON v. CITY OF NEW ORLEANS.*

The second article of the city ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans, approved February 11, 1853, which provides, "that from and after the first of January, 1855, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as stated in said ordinance," is not in conflict with the provisions of the constitution of the United States.

APPPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. W. W. King, for plaintiff and appellant. *G. S. Lacey*, City Attorney, for defendant and appellee.

HOWELL, J. The plaintiff has appealed from a judgment against him in a suit brought by him as master and owner of the steamer Robert E. Lee, to enjoin the city of New Orleans from levying on the

said vessel certain charges called levee dues, and to recover the amount paid by said vessel within the twelve months preceding the institution of the suit, and certain alleged damages.

The claim of the city for the charges against the vessel is based on the second article of "an ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans," approved February 11, 1853, and which provides "that from and after the first of January, 1853, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as follows: ten cents per ton, if not in port over five days, and five dollars per day after said five days shall have expired; *provided*, that boats arriving and departing more than once each week shall pay only seven cents per ton each trip, and boats arriving and departing more than twice each week shall pay only five cents per ton."

It is contended by plaintiff that this ordinance is in conflict with the provisions of the federal constitution, which gives to Congress power to regulate commerce with foreign nations, among the several States, and with the Indian tribes; which declares that no vessels bound to or from one State shall be obliged to enter, clear, or pay duties in another; that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and that no State shall, without the consent of Congress, lay any duty on tonnage; and also in conflict with the laws of Congress and of this State in relation to the admission of Louisiana into the Union.

The same points, supported by the same line of argument as in this, were presented in the case of the First Municipality v. Peaslee et al., 2 An. 540, and were decided adversely to the position taken by the plaintiff in this case. It was there held that the authority of the municipal corporation to impose a wharfage or charge on vessels moored in the port of New Orleans, to defray the expenses of the erection and maintenance of wharves and other work necessary for the loading and unloading of vessels, and to secure a convenient access to them, is not inconsistent with any law of the State or United States, or any provision of the federal constitution, and that the courts will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose; the question of the extent to which this right may be exercised, being purely administrative.

We think these views correct, and strictly applicable to the case now before us. The "levee dues" under consideration, are not a "duty on tonnage," nor a regulation of a burden on commerce, nor a duty

upon vessels plying between the States, within the contemplation of the constitution of the United States, but charges as compensation for commercial facilities furnished by the city, and for which, by the common consent of mankind, compensation is paid. 9 R. 332; 9 Wheat. 235. The question of the right to impose such charges, whether under the name of wharfage or levee dues, being judicially determined, the manner and extent of its exercise are left to those to whom the management of the municipal affairs are intrusted, under their responsibility to those whom they represent. The aggregate of charges may, possibly, be largely in excess of the actual necessary expenses during one year, and the very next be insufficient to meet. This will result from the nature of the river banks, the action of the river current, the quality and nature of materials used; the fluctuations of commerce, and many other causes unforeseen and irregular in their operation, and all which show the impossibility of judicial control and regulation of the subject.

Being of opinion that the charges complained of are not in conflict with the provisions of any fundamental or statutory law of the country, and that the policy of their imposition belongs to the consideration of another department of government, it is unnecessary for us to inquire into the other points presented in this case. We think the conclusion of the court *a qua* correct.

Judgment affirmed.

*Carried by writ of error to the Supreme Court of the United States, and reversed by that tribunal.

No. 5102.

WILLIAM L. McMILLEN v. ROBERT K. ANDERSON.*

Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue.

The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873 provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the legislator for enforcing a right of the sovereign and is *due process of law*.

The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. J. E. Leonard*, for plaintiff and appellant. *Hiram R. Steele*, District Attorney, and *C. A. DeFrance* for defendant and appellee.

McMillen v. Anderson.

LUDELING, C. J. The plaintiff enjoined the defendant from selling his property, seized under act No. 47 of 1873, to pay licenses due by him as a retail merchant and a retail dealer in spirituous liquors.

There was judgment in favor of the defendant, and against the plaintiff, dissolving the injunction with damages, and the plaintiff has appealed.

From the record it appears that R. K. Anderson was discharging the duties of the office of tax collector in and for the parish of Carroll and State of Louisiana, under a commission issued in due form, in 1873; that having demanded payment of the licenses due by W. L. McMillen as a retail merchant and retail dealer in spirituous liquors, he, in a letter to Anderson, refused to pay them to R. K. Anderson, on the grounds that the said Anderson was not legally authorized to collect them, as, he alleged, Governor Kellogg had no authority to appoint tax collectors, being himself a usurper; and he threatened Anderson with a suit for damages, if he trespassed upon his property by attempting to seize it. It further appears that the tax collector afterwards called upon the agent of W. L. McMillen to point out property, who first refused and offered to make resistance to the officer, but afterwards he did point out property, which the collector seized and he appointed a keeper thereof. On the next day, the said agent of McMillen, with others aiding him, drove said keepers from the premises, and he then barricaded the windows and locked the doors. Whereupon the tax collector returned, and used force to effect an entrance into the building and again made a seizure of property to satisfy the taxes due by said McMillen. It is urged that the action of the officer was harsh and oppressive, and in violation of article 9 of the constitution. We have failed to discuss wherein the constitution has been violated by the defendant or the law of the State, under which he was acting. The only violator of law, in these proceedings, appears to have been the plaintiff or his agent, in resisting, by force, an officer in the discharge of his official duties.

The plaintiff further objects, that the defendant is attempting to take plaintiff's property without due process of law.

Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue. 11 Mich. 139; 18 How. 272; 2 Yerg. 260, 599; 4 Hill 146. The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873, provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the leg-

islator for enforcing a right of the sovereign and is due process of law.

On the trial, bills of exceptions were taken to the rulings of the district judge refusing to receive testimony in regard to the election of Governor Kellogg, etc., on the grounds, that the right of an officer to a position which he holds can not be inquired into or his action be declared null, in a suit between third parties.

The ruling is correct, being in accord with the well settled jurisprudence of this State. 13 An. 403; 22 An. 33; 25 An. 263, 267.

The appeal is frivolous. It is therefore ordered and adjudged that the judgment appealed from be affirmed, and costs of appeal.

* Carried by writ of error to the Supreme Court of the United States.

No. 4333.

IN THE MATTER OF THE COMMISSIONERS OF THE FIRST DRAINING DISTRICT, PRAYING FOR THE HOMOLOGATION OF THE ASSESSMENT ROLL, ETC.*

The opponents to the homologation of the assessment roll presented by the commissioners of the First Draining District err in basing their opposition on the ground that some of the lands upon which the assessment in controversy is established, were drained at their cost under the provisions of act No. 49 of 1839, and are by the thirteenth section thereof specially and forever exempted from any further assessment for draining. This section created no contract between the State and the opponents, by which their lands were exempted from the assessment under consideration.

This assessment is not an *extra tax* within the contemplation of said thirteenth section, which made it the duty of the municipality of New Orleans to maintain the works erected by the draining company on the particular section drained, without ever levying an extra tax on the lands so drained, but only out of the funds arising from the general tax imposed throughout the municipality.

The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1838 and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of the act of 1861.

The Legislature of 1871, in act 30, has legalized the assessments made by the three boards of commissioners under the said acts of 1838 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are now seeking to do.

The State, in ordering the draining, is exercising sovereign power, and can of course direct or authorize the work to be done in such way, and compensation made in such terms, as its discretion may deem best, restrained only by the fundamental principles upon which the government is to be conducted; and nothing is found in those principles inhibiting the State from having the means provided for such a work in the way it is done in the present system of drainage in New Orleans. The existing laws clearly authorize the collection sought to be enforced, and no reason can be seen for judicial interference with the discretion of the State.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Rufus Waples*, for the city of New Orleans and Board of Administrators, praying for homologation, etc., and appellants. *W.*

O. Denegre, Hornor & Benedict, Trist & Olivier, Gilmore & Sons, Campbell, S. P. Blanc, Lea, Finney & Miller, Clarke, Bayne & Renshaw, and others, for opponents and appellees. G. S. Lacey, amicus curiæ.

HOWELL, J. As the constitutional questions raised in this proceeding have, in our opinion, been decided in the case of the Draining Company, 11 An. 370, we think it necessary to consider only the following grounds of opposition herein as argued before us :

First—That some of the lands, upon which this assessment is levied, were drained at their cost under the provisions of act No. 49, of 1839, and are, by the thirteenth section thereof, specially and forever exempted from any further assessment for draining.

Second—That by act 165 of 1858, the assessments for draining any one section or district shall not exceed three hundred and fifty thousand dollars, which sum has already been nearly exhausted, and the present assessment is for \$450,000 additional.

Third—That the money can not be collected in advance of the completion of the work.

L. Section 13 of the act invoked reads: "That whenever any section of land shall have been drained and cleared by said draining company, it shall abandon the same to the municipality or municipalities in which the said section may be situated; and whereas, the said draining will have been effected entirely at the expense of the proprietors of said land, and will greatly contribute to the salubrity and drainage of the front part of the said city, the said municipality or municipalities shall thereafter maintain the levees and ditches made by said draining company, and the machinery and other works erected by the same on the said sections, in good repair and in efficient condition, without ever laying an extra tax on the land so drained. If any of the said sections should extend into two municipalities, the steam engine and other machinery erected thereon by the said draining company, shall be kept in repair and operation by the municipality within the limits of which it is established; but the other municipality shall contribute to the expenses thereby occasioned, in the same proportion which the extent of the portion of said section lying within the limits, bears to the extent of the portion of the said section embraced within the boundaries of the municipality wherein the said engine or other machinery and building have been constructed, but each municipality shall maintain the ditches and levees made by said company within its own limits."

It is contended by the opponents that this is a contract between them and the State, by which their lands, within a certain section drained by the said draining company, are exempted from the assessment now under consideration. We can not concur in this view, and

we think the litigation in the case cited in 11 An. clearly shows that the draining of opponents' lands by the then draining company was not done under a contract between the State and the opponents, or their authors. We are unable, moreover, to find in the above section the elements of a contract. The State, in providing for the draining of said lands, was exercising one of the highest powers of its sovereignty, without requiring the consent of the owners, but rather enforcing it in despite of their opinions and objections, and directed that when completed, the burden of maintaining and preserving the benefits thereof should be imposed upon the municipal government and not upon the owners of the lands most directly benefited. This was but justice. But there was nothing like a mutual agreement that, if the owners would pay the company for draining their lands, the said lands should never again be required to contribute to any draining that might be or become necessary.

Those lands having thus been drained and made valuable, were thereafter like the lands in the front and higher part of the city, and in common with them liable for maintaining the established drains and constructing any that might be elsewhere needed, for the common benefit. And this is what is now being sought by these proceedings; all the lands within the first draining district, as it now exists, are uniformly assessed to effect the draining of all the low lands within its limits. It is not an extra tax within the contemplation of the said thirteenth section, which made it the duty of the municipality, in its corporate capacity, to maintain the levees and ditches made, and the machinery and other works erected by the draining company on the particular section, without ever laying an extra tax on the lands so drained. That is, the lands so drained were not to have an extra tax levied on them to maintain those works; but the said work, etc., were to be maintained out of the funds arising from the general tax imposed throughout the municipality—maintained at the public expense and not at the expense, or the increased, additional expense of the lands so drained. This we think is the fair, legitimate construction and purpose of the section under consideration, and renders it unnecessary to decide whether the legislature sought by it, and had the power to limit or restrict the legislative action and authority of future legislatures.

II. We do not consider the second objection well founded. The act of 1858 did limit the assessment in each of the three districts to three hundred and fifty thousand dollars; but the supplementary act No. 191, of 1859, authorized each of the three boards of commissioners to issue bonds to the amount of three hundred and fifty thousand dollars, and to levy an assessment to pay the interest and principal

thereof, the amount of which assessment, demandable yearly, should not exceed in the aggregate more than one tenth of such assessment. The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1858, and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of this act of 1861. It is stated by a witness in this case, who was a member of one of the boards of commissioners created by the act of 1858, that the boards thought they could go to the extent of seven hundred thousand dollars each. Whether they are correct or not in such opinion, the legislature of 1871, in act No. 30, has legalized the assessments made by the said three boards of commissioners under the said acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the Board of Administrators of New Orleans to collect the balance due on said assessments, which the said administrators are seeking to do in this case, and are asking for the homologation of the assessment roll showing the assessments due by the persons and property assessed, in the First Draining District within the parish of Orleans, from the second to the tenth annual installment inclusive.

III. The judge below sustained the third objection, and held that the assessment can not be collected until the drainage is completed, on the theory that the State or city, acting under authority from the State is but the *negotiorum gestor* or special agent of the parties for whom the work is to be done, and is entitled only to reimbursement for all disbursements actually made. In this there is error. As we have already remarked, the State, in ordering the draining, is exercising sovereign power, and can, of course, direct or authorize the work to be done in such way and compensation, made on such terms as in its discretion may seem best, restrained only by the fundamental principles upon which the government is to be conducted, and we find nothing in them inhibiting the State from having the means provided for such a work, in the way it is done in the present system of drainage in the city of New Orleans. On this question we see no room for judicial interference with the discretion of the State, and we think the existing laws clearly authorize the collection sought herein to be enforced.

There are other grounds of opposition in the record, but they have not been urged before us, and we find nothing in them demanding attention. The proceeding, as to the property belonging to the succession of John Davidson, not being probate in its character and object, is not in conflict with the constitution, giving exclusive probate jurisdiction to the Second District Court.

It is therefore ordered that the judgment appealed from be reversed,

and that the oppositions herein be dismissed at the costs of the opponents respectively; and it is further ordered that the assessment roll herein, except that portion designated as "Book No. 2, B," on said roll, be and is hereby approved and homologated, and this approval and homologation shall operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. in addition to the amount assessed, to pay costs and counsel fees.

WYLY, J., *dissenting*. I dissent in this case and reserve the right to file my reasons therefor.

LUDELING, C. J. In this case a rehearing is granted of our own motion, so as to enable us to correct an error in the decree in regard to the exception made in the decree relative to book B., without prejudice to the right of parties to ask for rehearing on the merits, within the legal delay, dating from the original decree.

Restricted rehearing granted *ex proprio motu*.

HOWELL, J. Our attention having been called to the fact that "Book No. 2 B," excepted from the operation of our decree herein, embraced the whole of the area that had been drained under the act of 1839, and was by said act exempted, as contended, from the present assessment—the principal question discussed in our former opinion—we, of our own motion, ordered a restricted rehearing, in order to make our decree conform to the views we expressed on the point, as the exception is in conflict with our conclusion, and was made without understanding, at the time, that this book contained the lands which were alleged to be exempt.

In granting this rehearing, for this limited purpose, we expressly reserved to all parties the right to apply for a rehearing upon the merits. No one, except the estate of Davidson, has applied for a rehearing.

The grounds upon which this application of the estate of Davidson is based, are the same upon which we expressed our opinion on the first hearing, and we are not convinced that we erred and can not grant a rehearing thereon.

As to the correction of our decree it follows as a matter of course.

It is therefore ordered that the rehearing asked for by the estate of Davidson be refused, and it is further ordered that our decree herein be amended by striking therefrom the phrase "except that portion designated as 'Book No. 2, B;'" that the said portion of the assessment roll be embraced in this judgment of homologation, and as thus amended the said decree remain undisturbed.

Rehearing refused on the merits.

* Carried by writ of error to the Supreme Court of the United States, as far as the estate of Davidson is concerned.

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No. 3111.^M

E. A. SWITZER v. JOHN HEINN AND MARY HEINN, Owners of the Steamboat Frolic.*

This is a personal action against the owners of a steamboat, the vessel being seized to enforce a lien accorded by a State law, under the conservatory remedy of provisional seizure. It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction.

The State court, having once obtained lawful jurisdiction over the parties and subject matter, could not be subsequently divested thereof by the bankrupt court.

Congress has not only not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee in bankruptcy. This principle applies not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains undetermined.

APPEAL from the Fifth District Court; parish of Orleans. *Leaumont, J. B. Egan and E. N. Whittemore*, for plaintiff and appellee. *E. T. Merrick, Race & Foster, A. G. Brice*, for defendant and appellant.

WYLY, J. The plaintiff sued the defendants for his wages as captain of the steamboat Frolic and provisionally seized the vessel, which was afterwards released on bond.

The defendants were subsequently adjudged bankrupts, and their assignee was made party, contradictorily with whom this case was tried, and judgment rendered in favor of plaintiff for the amount of his claim, eight hundred and seventy dollars.

The assignee has appealed. This is a personal action against the owners, the vessel being seized to enforce the lien accorded by article 3204 R. C., under the conservatory remedy of provisional seizure. C. P. 285, 289.

It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction. *Lew v. Galceran*, 11 Wall. 185.

It is contended, however, that the decree of bankruptcy divested the court of jurisdiction, and that it had no authority to proceed to trial and render judgment against the assignee; that the plaintiff should have gone into the bankrupt court to enforce his claim.

The State court having obtained lawful jurisdiction over the parties and subject matter could not be divested thereof by the bankrupt court.

"Congress could, no doubt, have made an adjudication in bankruptcy operate *proprio vigore* to transfer all causes which should be pending in other courts at the time of the filing of the petition and to which the bankrupt should be a party, from those tribunals into the court of bankruptcy. It has not, however, done so.

It not only has not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those

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courts by the assignee. This principle applies not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien so long as the amount due is in dispute or remains unascertained." Bump's Law and Practice of Bankruptcy, sixth edition, pages 187, 198, 199, and authorities there cited.

The demand of the plaintiff is fully established by the evidence in the record.

Judgment affirmed.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

No. 3428.

KENNETT & BELL v. UNION INSURANCE COMPANY OF NEW ORLEANS.*

The rules and regulations of the United States Board of Supervisors do not specify and particularize the short bends and points at which certain precautionary signals are to be made by steamers. In the absence of such specification by the board, it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places where, by the rules and regulations governing pilots, signals are to be given.

A transcript of the proceedings before the United States inspectors, in relation to the sinking of the steamboat Texarkana, which gave rise to this suit, embracing the evidence taken on that occasion, was offered on the part of defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios* and irrelevant. The court *a quo* sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. The court did not err. The action taken by the board of inspectors could not bind the plaintiff who was not a party to it.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Clarke, Bayne & Renshaw*, for plaintiffs and appellees. *J. H. Isley, Kennedy & Chiapella*, for defendant and appellant.

TALIAFERRO, J. The defendants are sued for \$10,000 on a policy of insurance taken with the company upon the hull, engines, furniture and appurtenances of the steamboat Texarkana, for one year from the seventeenth of December, 1869, to the seventeenth of December, 1870. It seems the boat insured sunk in Red river, about the first of September, 1870, from the effects of a collision that occurred between the Texarkana and the steamboat Era No. 9. The boat and all her appurtenances were treated as a total loss, and abandoned to the insurers.

The answer is a general denial. The plaintiff had judgment for the amount claimed and defendants have appealed.

This case turns entirely on questions of fact. It is urged in defense that the accident occurred from a violation of rule No. 6 of the rules and regulations adopted by the board of supervising inspectors in 1865, under the provisions of the twenty-ninth section of the act of

Congress "for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."

The rule sixth is in these words: "When any steamer, whether ascending or descending is nearing a short bend or point, where from any cause a steamer approaching in an opposite direction can not be seen at a distance of six hundred yards of that bend or point, shall give a signal of one long sound of his steam whistle, as a notice to any steamer approaching; and if there should be any approaching steamer within hearing of such signal, it shall be the duty of the pilot thereof to answer such signal by one long sound of his steam whistle, when both boats shall be navigated with the proper precautions as required by the preceding rule."

The defendants assume that at the place where the collision happened there is a short bend or point, where it is made the duty of pilots to sound their steam whistles as signals of the approach of boats according to the rule six, just quoted. This is required to be done at such short bends or points where a boat can not be seen at the distance of six hundred yards. The evidence is that neither of the pilots of these boats sounded his whistle until the boats were too near each other for the collision to be avoided, the regulations by law requiring that signals shall be given in approaching short bends and points in ample time to have the boats moving in their proper places so as to pass each other safely. Defendants hold that the loss of the insured boat was the result of the culpable neglect and want of skill in the pilot and managers of the Texarkana, as well as that of the other boat, and that they are not bound under the policy.

But the rules and regulations of the board of supervising inspectors do not specify and particularize the short bends and points at which these precautionary signals are to be made. In the absence of such specification by the board it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places, where by the rules and regulations governing pilots, signals are to be given. Accordingly we find from the evidence that the point where the collision in this case occurred, never had been considered as a place coming within the requirements of rule No. six; and all the Red river pilots who testified in this case, and there were some half dozen or more of them, were unanimous in saying they never knew or heard of the steam whistle being used at the point in question as being required by rule six. A diagram of that part of the river where the accident happened is given in connection with the evidence of one of these pilots. It would clearly appear from this diagram and the general drift of the testimony that at the place where the collision took place, there is not a short bend or point "where,

Kennett & Bell v. Union Insurance Company.

from any cause a steamer approaching in an opposite direction, can not be seen at a distance of six hundred yards." The diagram represents a gradual curve in the river, called technically by one or two of the witnesses a "kink." It does not present an abrupt bend or turning of the river constituting "a short bend or point."

It appears that after this accident happened an investigation of the subject was made before the United States inspectors under the act of Congress. A transcript of the proceedings before the inspectors, embracing the evidence taken was offered on the part of the defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios*, and irrelevant. The court sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. A bill of exceptions was taken by the defendants. We think the ruling of the court correct.

The action taken by the board of inspectors could not bind the plaintiff, who was not a party to it. That portion of the testimony let in, shows some discrepancy between the evidence given by Kountz, the pilot on duty aboard the Texarkana at the time of the collision, and that which he gave previously before the board of inspectors, but as against the mass of evidence introduced in court on the part of the plaintiff, it can have but little effect. We regard the evidence as establishing beyond doubt that at the time of the collision, the Texarkana was on the proper side of the river for an ascending boat to be, and that she was near the shore. This last fact is well established. The force with which she was struck threw her against the shore. Although the river at the place where the accident took place was narrow, there was room for the other boat to have passed without collision had she been further out in the stream.

We are of the opinion that the plaintiff's case is made out. There are two other bills of exceptions taken by defendants, but it is not important to the decision of this case that we should pass upon them.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

LUDELING, C. J. In this case an application for a rehearing is made on several grounds. We find there was error as to the failure of the court to allow the defendants a credit of two hundred dollars, the two per cent. on the amount (\$10,000 insured), according to the policy. We now order that said credit be allowed, the appellee consenting thereto. The application for rehearing is refused.

* Carried by writ of error to the Supreme Court of the United States, and dismissed on motion by that tribunal.

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State ex rel. Baldwin v. Dubuclet, State Treasurer—State of Louisiana, Intervenor.

No. 5376. ^X ✓

STATE EX REL. ALBERT BALDWIN v. A. DUBUCLET, State Treasurer—
STATE OF LOUISIANA, Intervenor.

This appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, on the twentieth of July, 1874, the relator procured the consent of the Governor for the transfer of the case to Monroe, and for its trial at the term held at that town. The Governor also employed an attorney for the defense, notwithstanding the opposition of the Attorney General and of Dubuclet, the defendant.

The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and the act 21 of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

The citation was necessary to perfect the appeal. The defendant's case can not be tried without his consent, except at the time and place designated in the citation. A trial at a different place would be a trial without a citation. Besides, he is entitled to the delay fixed, to prepare his defense.

The plea that defendant is not interested, has no force. If not interested, why was he cited and made a party?

There is nothing in the act for "funding the obligations of the State," relied on by relator, which confers on him or implies a right or duty, as "Fiscal Agent," to recover from the State Treasurer, and to hold and account for, under the obligations of his official bond, all the moneys belonging to the State, or to choose a bank for such purpose, and nothing which imposes on said treasurer the duty to deposit said moneys with the relator, and therefore there is no cause for the mandamus prayed for.

It is only where a specific, ministerial duty is imposed by law on an officer, that the writ of mandamus can properly issue against him. The term "fiscal agent" does not necessarily mean depository of the public funds, so as, by the simple use of it in a statute without any directions in this respect, to make it the duty of the State Treasurer to deposit with him any moneys in the treasury and confer on such agent power to compel such deposit.

A PPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. Kennard, Howe & Prentiss, for relator and defendant.
A. P. Field, Attorney General, and *J. Q. A. Fellows*, for defendant
and for intervenor.

ON MOTION TO DISMISS.

WYLY, J. The relator has appealed from the judgment rejecting his mandamus proceeding to compel the defendant to recognize him as fiscal agent, under act No. 3 of the acts of 1874, and to deposit with him all the funds of the State.

The appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, July 20, 1874, the plaintiff procured the consent of the Governor for the transfer of the case to this place, and for the trial thereof at this term; and under act No. 21 of the acts of 1872, the Governor employed an attorney to take charge of the defense.

The Attorney General objects to the trial of the case before the

State ex rel. Baldwin v. Dubuclet, State Treasurer—State of Louisiana, Intervenor.

return day, and at this term of the court; he denies the authority of the Governor to give consent for its transfer, and also his authority to appoint counsel to assist or supersede him in the management of the case.

Antoine Dubuclet, the defendant, also refuses to consent to the trial of the case here.

Looking to act 21 of the acts of 1872, the statute under which the Governor acted in this case, we find that he "has the right in case of the absence, death, resignation, or inability to act in any particular case of the Attorney General, or proper district attorney, or where either of them may be directly interested, a right to designate an attorney for such case to act in behalf of the State, for the protection of the public interest."

Was the Governor authorized under this statute to consent to the transfer of the case and the trial thereof at this term, notwithstanding the opposition of the Attorney General who tried the case in the court below? We think not.

The Attorney General is the proper officer to represent the State in all her lawsuits, and the statute in question was not intended to deprive him of the control and management of his cases.

In order to protect the public interest in any particular case where the Attorney General was interested, or was unable to act from death, resignation, absence, or from any other cause, this statute authorizes the Governor to appoint an attorney for such case. It does not authorize him to give consent for the transfer of any particular case and for the trial thereof before the return day, at a different term of the court. The act gives him no personal control of the case whatever. When the condition happens upon which he has authority to supply counsel for the State, the attorney designated by him takes control of such case.

The attorney designated by the Governor in this case does not consent to its trial here. But under the statute the Governor was utterly without authority to appoint an attorney to act in this case, because the Attorney General is not personally interested, he has not resigned, nor is he dead, or absent, or unable to attend to the duties of his office. He appears to have faithfully defended the case in the court below in behalf of the State, the intervenor, and in behalf of Dubuclet, the defendant. He gained the case, and he will doubtless be ready to meet the relator and try the appeal at the time and place where it was made returnable, and where he was cited to trial. Because he refused to try the appeal at a different place and term, and before the return day, it can not fairly be said that the Attorney General is unwilling

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or unable to act, or that the public interest confided to him has in any manner suffered or is likely to suffer. In refusing to try the case, as desired by the relator, he has simply exercised a legal right, of which the appellant has no cause to complain.

The defendant, Dubuclet, is interested in this case; he is the party against whom the mandamus is sought, and he has not consented to the trial here. He has been cited to meet the relator and try the appeal on the first Monday of November next, at New Orleans. Under section 7 of act 35, of the acts of 1874, he can employ special counsel for his defense. If the case is tried now he may well complain that he has not been heard; because to try the case at a different place, and before the return day, is equivalent to a trial without citation and an opportunity to make a defense.

What is the use of citing the defendant to the trial of this appeal at New Orleans on the first Monday of November, 1874, if he can be condemned rightfully at the July term of 1874, at Monroe?

If citation was necessary to perfect the appeal, the defendant's case can not be tried (without his consent) except at the time and place where he was cited.

The appellant contends, however, that the defendant has no interest. If so, why was he sued and cited below? If his presence was necessary at the trial there, it is equally as important here. And the trial of the defendant before the day he was cited to trial, and at a different place, is certainly a trial without citation. He is entitled to the delay from the time the appeal was taken until the return day thereof to prepare his defense and to employ special counsel, if he chooses to do so.

The defendant is the party sued and against whom our decree must be enforced, if the mandamus be made peremptory. He is a necessary party, and the case can not be tried here without his consent.

It is therefore ordered that this appeal be stricken from the docket, with leave to the appellant to withdraw the transcript and file it at New Orleans, in conformity with the order of appeal.

LUDELING, C. J., *dissenting*. The simple question now before the court for decision is, can the chief executive of the State consent on the part of the treasurer, and in spite of his opposition and of the Attorney General's, that the case may be removed to Monroe for speedy determination?

The case is one in which an officer of the State is proceeding, by mandamus, against another officer of the State, to compel him to perform a ministerial duty. It is made the duty of the chief executive of the State "to see that the laws are faithfully executed." If it be a ministerial duty of the treasurer, under any law of the State, to do

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what he is required to do in the relator's petition, it is the duty of the executive to see that the law be executed. The case by law, is a preference case, and I am at a loss to imagine why the Governor could not direct the case to be submitted for decision, by the Attorney General, and if he refused or neglected to do so, to employ other counsel. Dubuclet personally, is not before the court; it is the treasurer alone who is before the court, in his official capacity. And in numerous cases running all through the 24th, 25th and 26th Annual, this court has recognized this fact, that when an officer is proceeded against in his official capacity, he has no right to appear in person or by attorney selected by himself, but must be represented by the Attorney General or some other attorney selected by the Governor. Act of 1872, p. 62.

This case was brought here by consent of the relator and the Governor.

The Attorney General applied for time to file a brief after the case had been submitted, which was allowed, and he filed his brief without urging this want of consent; and at the last moment he files another brief through another attorney, urging this want of consent on the part of the treasurer. I do not think it should be considered; but if it be, I do not regard the objection valid.

What honest reason can be urged against an early decision, on the construction of a law, defining the official duties of State officers? I can not imagine any, and am the less inclined to consider the objection of want of consent.

ON THE MERITS.

HOWELL, J. The relator alleges that he was elected and has duly qualified as Fiscal Agent of the State under act No. 3 of April, 1874, known as the Funding Act and which created a board of liquidation, composed of the Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, Speaker of the House of Representatives and such fiscal agent, chosen by said officers, that he has furnished bond in the sum of \$250,000 as required by said Board, "that as fiscal agent of the State, it is his duty to receive from the State Treasurer and to hold and account for, under the obligations of his official bond aforesaid, all the moneys belonging to the State," that he has chosen the New Orleans National Bank, whereof he is a director and the president, as the place of deposit of the State funds and so notified the Treasurer, whose duty it is to deposit the same with the relator as fiscal agent, but has failed and refused to do so, though requested, and he prays for a writ of mandamus commanding said Treasurer to recognize relator as the fiscal agent of the State and to deposit with relator in his said

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capacity all the State funds now on hand or which may hereafter come into his the treasurer's hands or control.

The treasurer denies that the relator has any legal right to demand of him as treasurer, the moneys of the State or that there is any law which gives to the relator the right to the deposit of the money of the State, and he adopts the answer of the State which intervenes and alleges that under the constitution and laws the treasurer is the only officer authorized to receive, keep and disburse all moneys of the State and he can not be interfered with or controlled in that respect by any authority; that there is no provision in the "Funding bill" which makes it the duty of the treasurer to pay out to or deposit with the relator or the latter to receive any of the State moneys, and hence there is no cause or ground for the writ of mandamus; that the title of the "Funding act" does not express the object of the appointment of a fiscal agent of the State with power to receive and hold the moneys of the State which is a matter foreign to the objects of said act; that by existing unrepealed law the treasurer is required to deposit the State moneys in some safe bank with which he shall keep an account and the said deposits can only be removed upon the consent of the Governor and the causes therefor must be reported to the legislature; that under the said law he has the moneys of the State deposited in the Louisiana National Bank, the safety of which would be jeopardized by depositing them with an individual not an officer of the State and not required by law to give a bond. From a judgment refusing the writ of mandamus, the relator has appealed.

The title of the funding bill and the sections relied on by the relator, are as follows: "An act to provide for funding the obligations of the State by exchange of bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers from diverting funds except as provided by law and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes and to repeal all conflicting laws.

SECTION 1. "Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That for the purpose of consolidating and reducing the floating and bonded debt of the State, the Governor, Lieutenant Governor, Aud-

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itor, Treasurer, Secretary of State, and Speaker of the House of Representatives are hereby authorized to cause to be prepared, and to issue bonds, to be known as "consolidated bonds of the State of Louisiana," of the denominations of one hundred, five hundred, and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively, and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York and the city of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be attached thereto; said interest and principal to be payable in lawful money of the United States.

"SEC. 2. Be it further enacted, etc., That the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the State, who shall be a member of said board.

SEC. 7. Be it further enacted, etc., That a tax of five and-a-half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other; and that it shall be deemed a felony for the Fiscal Agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment not more than ten years nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by said board of liquidation from the lowest offers, after due notice, provided, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall authorize and make it the duty of the auditor and treasurer, and the said board, respectively, to collect said tax annually, and pay said interest and redeem said bonds until the same shall be fully discharged."

SEC. 17. "That all acts or parts of acts in conflict with this act, or any section thereof, are hereby declared to be repealed, and that this act shall take effect from and after its passage."

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It seems a sufficient answer to relator's demand to say that there is nothing in the foregoing which confers on him or implies a right or duty as fiscal agent "to receive from the State treasurer and to hold and account for, under the obligations of his official bond aforesaid, all the moneys belonging to the State," or to choose a bank for such purpose, or that imposea on the said treasurer the duty to deposit said moneys with the relator, and therefore there is no case, no cause for the writ of mandamus. The act does not specifically prescribe any duties of the fiscal agent, confer on him any special powers or make any reference in the title or elsewhere to the deposit or the choosing of a place of deposit of the moneys of the State; and it is only where a specific ministerial duty is imposed by law on an officer, that a writ of mandamus can properly issue against him.

But it is contended on behalf of the relator, that the phrase "Fiscal agent of the State" had, at the time the Funding act was passed, a distinct, well understood meaning, and that the legislative intent in using it was manifest, as the depository of the State funds, that is, the fiscal agent of the State created by this act was, by necessary intendment, the depository of the State moneys, which however, are to remain there or with him subject to the checks of the State treasurer just as they are now kept and checked on by the treasurer in the bank selected by him under previous legislation. And this theory, it is said, is derived from and supported by the laws relative to the fiscal agent of the city of New Orleans, which was made the depository of all the city funds and the law making the Citizens' Bank the fiscal agent for the funding of the floating debt in 1870.

Our examination of these laws does ^{not} lead us to the conclusion, as suggested, that the term "fiscal agent" ^{is} for principle necessarily the depository of the public funds so as, by the simple use ^{to au} it in a statute, without any directions in that respect, to make it the duty of the city or State treasurer to deposit all moneys therein and confer on such agent power to compel such deposit with him or it.

As to the fiscal agent for the city of New Orleans, the laws referred to (see acts 1856, pp. 144, 145, acts 1870, extra session, p. 46), are explicit in directing when and how such agent—a bank—shall be chosen, what shall be placed in its keeping, the purposes thereof, how drawn, etc., while in the act under review, no such directions appear and nothing is said except that a majority of certain designated officers, composing a board of liquidation, shall elect a fiscal agent for the State, who shall be a member of said board and shall be subject to certain penalties should he divert a certain fund. But every officer of the State and board of liquidators are embraced in the same provision. And as to the "fiscal agent" under the funding act of 1870,

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(session acts 1856, extra session, p. 153), the president of a bank named, was designated by the law for the purpose, in conjunction with the Governor and Auditor, of negotiating the bonds authorized by said act, but no reference was made to the custody of the public moneys. The duty was specific and limited to the object of said act. We find in neither law nor any other, any thing that implies even that the use of the term fiscal agent in a statute confers the right to the public funds. By existing laws the treasurer is to deposit the State moneys in a bank selected by him, and he may, with the concurrence of the Governor, remove them to another if they become unsafe, (R. S. 3773), and there is nothing in the present funding act at all inconsistent therewith and they are therefore not repealed or affected by the repealing clause of this act.

Whatever may be the duties of the relator under the present funding act, it is clear to us that it is not one of his duties to demand, receive and place in a bank chosen by him or elsewhere the moneys of the State, those arising under the provisions of this act or from any other source. This duty pertains exclusively to the treasury department, and the moneys there can, under the constitution, only be withdrawn by the treasurer under a specific appropriation made by law.

Judgment affirmed.

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No. 3548.

R. ESTERBROOK AND A. GALLIER v. MARY E. GAUCHE.

This is an action of nullity brought by plaintiffs against a judgment, on the ground that it was rendered against them in the absence of their counsel, in consequence of the omission of the clerk to attach his name as attorney for them on the usual list posted up, wherefore they were deprived of the defense to which they were entitled. This omission was not attributable to the other litigants or to their counsel. It was merely an error of the clerk.

In this instance the plaintiffs have mistaken their remedy. The true one was an appeal. Their defense to the suit was, that the tacit or legal mortgage set up against them was not inscribed prior to the first of February, 1870. Relief was therefore attainable by appeal. Consequently an action of nullity will not lie.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens J. G. Schmidt*, for plaintiffs and appellants. *Thomas Gilmore* and *J. H. Isley*, for defendant and appellee.

WYLY, J. In suit No. 3547 of the docket of this court, John S. and Louisa Skinner sued Wm. C. Sibley to enforce a tacit mortgage on a house and lot in the city of New Orleans, which the latter purchased from John Gauche.

Sibley called the widow and heirs of John Gauche in warranty, and they called in warranty their vendors, R. Esterbrook and A. Gallier.

Esterbrook and Gallier v. Gauche.

At the trial in the court below the counsel for Esterbrook and Gallier was not present, because when the case was posted for trial his name was omitted from the list of cases posted for trial that day. He now brings this action of nullity in behalf of his clients to have the judgment which was rendered against them in his absence, revised because they were deprived of a just defense by the omission of the clerk to attach his name as attorney for them to the list at said posting. The court rejected the demand and plaintiffs have appealed.

It is not pretended that the omission of plaintiff's counsel's name from the list posted, was a fault attributable to the other litigants or to their counsel. It was merely an error of the clerk.

After examining the case we find the plaintiffs have mistaken their remedy. It was an appeal. Their main defense to the suit was that the tacit or legal mortgage set up, was not inscribed prior to the first January, 1870. On this point the evidence is as ample in the original suit as in the present action. Relief was therefore attainable by appeal; consequently, an action of nullity will not lie. 1 R. 523; 3 An. 646; 6 An. 249; 6 An. 799; 9 An. 203; 14 An. 396; 23 An. 146.

Judgment affirmed.

Rehearing refused.

No. 3626. ✓

O. W. FLUKER, Administrator v. AMOS KENT.

Parol evidence was clearly inadmissible to prove that the wife of the defendant was the debtor in a contract executed by him, and that he signed it as her agent, and not in his individual capacity as it appears in the contract itself, no error or mistake in executing the instrument being alleged in the answer.

This testimony being excluded, there is no reason why the defendant, who was not one of the heirs of his wife's father, should not pay the debt he contracted with the administrator of the succession, whether there are, or not, sufficient funds in his hands to pay the debts of the deceased.

If the plaintiff had consented, when the instrument was given, in consideration of the purchase by the defendant of succession property, that said defendant should not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

A PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Cross & Hardee, W. O. Pipkin, Merrick, Bace & Foster*, for plaintiff and appellant. *O. P. Amacker, T. & E. J. Ellis*, for defendant and appellee.

WYLY, J. This is a suit on the following instrument:

"ST. HELENA, January 2, 1875.

"On demand I promise to pay O. W. Fluker, administrator of

estate of Robert Fluker, deceased, thirteen hundred and eighty-one dollars and seventy-five cents, in solvent bank money of the State of Louisiana, for value received. I also promise to pay for ten thousand pounds of seed cotton, more or less, when amount of said cotton is ascertained, at six and one-half cents per pound.

"(Signed)

AMOS KENT."

The amount shown to be due on this contract is \$1991 75, subject to a credit on the second of May, 1866, of \$843 50.

The defense to the suit is:

First—The defendant gave the written obligation for purchases made by him for his wife, whom he represented at the sale of the succession property of her father, and by law and by express agreement with plaintiff no payment of the note was to be made until definite partition of the estate.

Second—The plaintiff has no cause to demand the payment of the note in advance of a final liquidation and partition of the estate among the heirs, because by the judgment homologating his account it appears that he has on hand ample funds to pay all the creditors of the succession.

If there were funds in the hands of the administrator sufficient to pay the debts, and if the maker of the instrument sued on was one of the heirs of Robert Fluker, deceased, of course the demand of the plaintiff could not be enforced, because article 2625 of the Revised Code provides that, "heirs may purchase property of the succession to the amount of their proportion, and are not obliged to pay the purchase money until a liquidation is had, by which it is ascertained what balance there is in their favor or against them."

The wife of the defendant was one of the heirs of Robert Fluker, but she did not sign the evidence of debt sued on nor make the purchase.

The defendant in his testimony, which was excepted to, swears that he purchased at the succession sale to secure his wife's rights, as heir, after ascertaining from the administrator that cash would not be required from the heirs who might purchase. "In this matter I acted solely upon her (my wife's) account, and not in my individual capacity. This was perfectly understood among the heirs and approved by the administrator. In this matter I had the full and perfect acquiescence of my wife. When I gave the note, it was the understanding with me and the administrator that the note was to be compensated by my wife's interest in the estate."

To the reception of this evidence the plaintiff took a bill of exceptions, on the ground that "parol proof can not be admitted against or beyond what is contained in the acts, nor what may have been said

Fluker, Administrator v. Kent.

before or at the time of making them, or since." Revised Code 2276. We think parol testimony was clearly inadmissible to prove that the wife of the defendant was the debtor in the contract executed by him, and that he signed it as her agent and not in his individual capacity; no error or mistake in executing the instrument being alleged in the answer. 8 An. 452; 19 An. 472; 23 An. 244; 6 Peters, 57, 60.

This testimony being excluded, there is no reason why the defendant, who was not one of the heirs of Robert Fluker, should not pay the debt he contracted with the plaintiff, the administrator of said succession, whether there is or not sufficient funds in his hands to pay the debt of the deceased. While the administrator continues in office he must discharge its duties, and collecting claims belonging to the succession is one of these. 14 An. 349.

If the plaintiff had consented, when the instrument was given in consideration of the purchase by the defendant of succession property, that the defendant would not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

It is therefore ordered that the judgment herein, in favor of defendant, be annulled, and it is decreed that the plaintiff recover judgment against the defendant for nineteen hundred and ninety-one dollars and seventy-five cents, with legal interest from the second of January, 1865, subject to a credit of eight hundred and forty three dollars and fifty cents, on the second of May, 1866, and costs in both courts.

Rehearing refused.

No. 3896.

JOHN T. BAILEY & CO. v. LACEY, TERRY & Co.

The plaintiffs having judgment against the defendants *in solido*, issued execution thereon and made Terry, one of the defendants, a party garnishee, propounding to him certain interrogatories. This proceeding was excepted to; the judge *a quo* erred in overruling the exception. Terry, being one of the defendants in execution liable *in solido* with the others, was not a third person, and could not be proceeded against by garnishment process.

APPPEAL from the Eighth District Court parish of Orleans. *Dibble, J. Hawkins & Tharp* and *A. G. Semmes*, for plaintiffs and appellees. *E. Phillips*, for defendant and appellant.

WILY, J. The plaintiffs having judgment against the defendants *in solido* for \$2979 66, issued execution thereon, and made L. H. Terry,

one of the defendants, a party garnishee, propounding to him certain interrogatories.

This garnishment proceeding was excepted to on the ground that L. H. Terry being one of the defendants in execution, liable *in solido* with the others, was not a third person, and therefore could not be proceeded against by garnishment process.

The court overruled the exception and L. H. Terry appeals. We think the court erred.

The appellant was defendant in execution, liable for the full amount thereof, and in no sense a third person. Against him the garnishment process did not lie. C. P. 246.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the garnishment process herein be dismissed at plaintiff's costs in both courts.

v

No. 5302.

STATE ex rel. WM. W. HOWE v. CHARLES CLINTON, Auditor—STATE
OF LOUISIANA, Intervenor.

Under a title to make appropriations for the general and current expenses for the year ending thirty-first of December, 1874, an appropriation for an expense or debt incurred prior to that time can not be made, because the object is not expressed in the title, as required by article 114 of the constitution.

Besides, the claim of plaintiff can not be enforced, because at the time it was incurred, the total debt of the State exceeded the limit fixed in the amendment of the constitution.

A PPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. Kennard, Howe & Prentiss, for relator and appellant.
A. P. Field, Attorney General, for intervenor and appellee.

WYLY, J. The relator appeals from the judgment refusing to render peremptory the mandamus sued out by him to compel the Auditor to issue to him a warrant for \$5000, pursuant to an appropriation in the second section of act No. 59 of the acts of 1874.

In this proceeding the State intervened and opposed the issuing of the warrant, on the ground that that provision of the act violates article 114 of the constitution, because it is not covered by the title, and also on the ground that it violates the amendment of the constitution, limiting the State debt to twenty-five millions of dollars. Both of these objections appear to be fatal to the pretensions of the relator.

The title of act No. 59 is, "An Act making appropriations for the general expenses of the State for the year ending the thirty-first of December, 1874." The appropriations contained in the first section seem to be for the purpose mentioned in the title. But such is not the

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case with section two, in which the appropriation in question is made. This section provides, "That the following amounts be and the same are hereby appropriated out of any moneys which may be received for delinquent taxes, licenses and penalties due the State prior to the first day of January, 1874; *provided*, that the Auditor of Public Accounts shall draw his warrants for the following, in advance of the payment of moneys into the treasury on account of said delinquent taxes, licenses and penalties, and said warrants, when so drawn, shall be receivable for all delinquent taxes, licenses and penalties due the State prior to the first day of January, 1874, as provided in act No. 3 of the session of 1874.

* * * * *

To William W. Howe, to pay claim approved by the Auditor of Public Accounts in his last report to the General Assembly, five thousand dollars."

This claim can not be regarded as an appropriation "for the general expenses of the State for the year ending the thirty-first of December, 1874." It was merely recognized by the Auditor as a debt already due by the State, in his report dated January 1, 1874.

Under a title to make appropriations for the general or current expenses for the year ending the thirty-first of December, 1874, an appropriation for an expense or debt incurred prior to that time can not be made, because that object is not expressed in the title, as required by article 114 of the constitution. This claim although it may be equitable (being for professional services rendered by the relator in defending several large suits against the State), can not be enforced, because at the time it was incurred the total debt of the State exceeded the limit fixed in the amendment of the constitution.

It appears from the Auditor's report, dated January 1, 1874, received in evidence in this case, that the total amount of the actual bonded and miscellaneous debt of the State is \$24,508,180, and the total amount of the bonds and miscellaneous debts for which the State is contingently liable, is \$5,483,602. Total actual and contingent liabilities of the State, \$29,991,782.

Deduct from this the total amount of delinquent taxes, which the Auditor estimates at \$3,000,000, and the actual and contingent liabilities of the State will be found to exceed \$25,000,000. Besides, warrants have already been issued against the fund or revenue due by delinquent taxpayers. In the Auditor's report the total amount of old warrants thus issued and outstanding is \$1,565,702 08.

We conclude, therefore, that the judge *a quo* did not err in refusing to enforce by mandamus the claims of the relator.

Judgment affirmed.

MORGAN, J., *dissenting*. In my opinion the employment of the relator

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by the Governor was authorized by law. The services which he rendered were conscientious, able and effective. The sum allowed him by the Legislature is insignificant in comparison to the magnitude of the interests which were intrusted to his care. I think payment of his services, under the authorized employment, formed a part of the expenses of the State, and I see no constitutional objection to the manner in which its payment was provided for. He earned his fee, and I think it should be paid to him.

I can not, therefore, assent to the decree just pronounced.
Rehearing refused.

No. 4819.

SUCCESSION OF HAMPTON ELLIOT—SAMUEL M. DAVIS v. MRS. VIRGINIA C. BURKE, Testamentary Executrix et als.—MRS. MARY E. RISLEY v. MRS. VIRGINIA C. BURKE—MRS. LETITIA C. ELLIOT v. MRS. VIRGINIA C. BURKE et als.

The property in controversy and claimed by Davis, belonging to the succession of Elliot, whose domicile was in Adams County, State of Mississippi, and it being undoubtedly the purpose of Elliot, in making the assignment under which Davis claims, to conceal his property from his wife whom he had abandoned, the court *a qua* did not err in rejecting his demand.

The title set up by Mrs. Risley, the second claimant, can not be considered a valid will. It is written in pencil on a small piece of paper; the intention of the party to make a will is not manifest, and there is no *corpus* on which a will can operate. The notes referred to in the writing are not those involved in this suit. Therefore the court below did not err in declaring the writing void as a will and setting aside the probate thereof.

The will relied on by Mrs. Burke, a third claimant, is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made. It is not sufficiently proved that the parties lived in open concubinage and were therefore not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

The rights of Mrs. Elliot, the surviving widow and fourth claimant, must be determined by the laws of Mississippi. According to those laws, said widow is entitled to one-half of the personal property of the deceased.

The immovable property is controlled by the laws of this State and passed under the will to Mrs. Burke.

A PPEAL from the second District Court, parish of Orleans. *Tissot, J. Clarke, Bayne & Renshaw*, for Davis, appellant. *J. S. Whitaker, J. A. Campbell, E. Bermudez, John Ray*, for Mrs. Risley, appellant. *E. H. McCaleb, T. W. Collens, and William H. Hunt*, for Mrs. Elliot, appellant. *Labatt & Aroni, R. Shackelford, J. L. Tissot*, for Mrs. V. C. Burke, appellee.

WYLY, J. On twenty-ninth March, 1872, Hampton Elliot died in New Orleans, leaving a surviving widow and no forced heirs, and

Succession of Hampton Elliot

property, chiefly in mortgage notes, appraised at upwards of \$80,000.

In regard to this property, the present controversy arises between the following parties: Samuel M. Davis claiming by deed or an assignment of date April 16, 1869; Mrs. Virginia C. Burke, by will of date twenty-ninth May, 1869, executed in Adams County, Mississippi; Mrs. Mary E. Risley, by will of date twenty-ninth November, 1871, executed in New Orleans; and Letitia C. Elliot claiming as surviving widow.

The court gave judgment as follows: The demand of Davis was rejected and the property decreed to belong to Hampton Elliot's succession. The will propounded by Mrs. Risley was held to be null and void, and her demand thereunder rejected. The demand of Mrs. Elliot was disallowed; and the will propounded by Mrs. Burke was declared to be valid, and she was recognized as the universal legatee of Hampton Elliot and, as such, entitled to the property in controversy.

From this judgment Davis, Mrs. Risley, and Mrs. Elliot have appealed.

In regard to the facts the finding of the court is that Hampton Elliot died possessed of the property in controversy, and that his legal domicile was in Adams County, Mississippi.

So far as the immovable property of the succession is concerned, Davis can not claim title, whether the funds employed by Elliot in the purchase thereof belonged to him or not.

In regard to the movable property claimed by Davis under the deed or assignment of sixteenth April, 1869, the inquiry is simply as to the ownership thereof, and for that purpose parol as well as written evidence may be considered.

If the position of the parties were different, that is, if Davis after collecting the \$80,000 and upwards from the succession of Jacob Surget under the assignment of the heirship of Elliot of date sixteenth April, 1869, had retained the money, and Elliot or his heirs were suing to recover it, he could hold up the deed or assignment, which he claims as the basis of his title, and parol evidence could not be received to contradict it, whether that instrument was a *bona fide* transfer or not. If it were a simulation nothing but a counter letter could show the fact so far as regards Elliot or his heirs.

But what was the action of Davis under the assignment of Elliot's heirship of the estate of his uncle, Jacob Surget, of date April 16, 1869? Under it Davis collected the money, and after accounting to Elliot as his principal, paid it over to him or put it under his control, and expressed the wish that Elliot may live long to enjoy it. Although neither Elliot nor his heirs could have disputed the title of Davis in an action against him for the money collected under the assignment of the sixteenth April, 1869, still, after the real intention of the parties

under that instrument has been executed and the money paid over to Elliot in pursuance thereof, it was perfectly competent to prove by any legal evidence the ownership of the thing. And the proof in the record shows beyond doubt that the property in controversy belongs to Elliot's succession. It was undoubtedly the purpose of Elliot in making the assignment to Davis to conceal his property from his wife, whom he had abandoned.

We are therefore of the opinion that the court below did not err in rejecting Davis' demand.

We will next consider the title set up by Mrs. Risley. She propounds it as a will. It was written in pencil on a small piece of paper, and is as follows :

"New Orleans, Twenty-ninth November, 1871.

Mary, I have shown you notes for loaned money for over eighty thousand dollars secured by first mortgage on valuable real estate in this city. There is a large margin allowed, that is, if house and ground is worth twelve thousand dollars, only six thousand would be loaned on it. If I die, this is for you.

H. ELLIOT."

We can not regard this as a testamentary paper. The intention of the party to make a will is not manifest ; and there is no *corpus* upon which a will can operate. The notes referred to in the writing are not those involved in this suit, because it is shown that they were never exhibited to Mrs. Risley. We think the court did not err in declaring the writing void as a will and setting aside the probate thereof.

In regard to the will set up by Mrs. Burke, it is not doubted that it is perfect in form and conveys title, unless her incapacity to inherit be established by the evidence. It is urged in argument, but was not pleaded, that the proof shows that Mrs. Burke lived in open concubinage with the deceased, and therefore under article 1481 of the Revised Code she was incapable of receiving a donation of immovable property from him, and could only receive a donation of movables in an amount not exceeding one-tenth part of his whole estate. In support of the position, the letters of Elliot to Mrs. Burke, introduced in evidence by herself, are chiefly relied on. They show a degree of familiarity highly unbecoming in the correspondence between a gentleman and a lady ; and from their tenor the relation of the parties to each other looks highly suspicious. But in the absence of corroborating evidence and in view of the fact that during the correspondence and nearly the whole time of their acquaintance, she was in New York and he in New Orleans, we can not decide the parties lived in open concubinage, and were, therefore, not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

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Our conclusion is that the will propounded by Mrs. Burke is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof, according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made.

We come now to consider the rights of Mrs. Elliot, the surviving widow of deceased. They must be determined by the laws of Mississippi. Looking to the Revised Code of Mississippi of 1871, we find article 1282, which reads as follows:

"When a husband dies intestate, or shall make his last will and testament, and not make satisfactory provision therein for his wife, as aforesaid, she shall be entitled to share in his personal estate in the following manner, to wit: If there be no children, or if there be but one child, in that case she shall be entitled, out of the residue left, after paying the debts of the deceased, to one-half; but if there be more than one child, in that case she shall be entitled to a child's part, in either case in fee simple, and she may claim distribution thereof at the time and in the manner that other distributees may have distribution of estates."

* * * * *

Elliot left no children and according to the laws of Mississippi his widow is entitled to one-half of his personal property. The immovable property is controlled by the law of this State and passed under the will to Mrs. Burke.

It is therefore ordered that the judgment herein be amended so that Mrs. Elliot, the surviving widow, be decreed to be the legal owner of one-half the movable property belonging to the succession of Hampton Elliot, and as thus amended it is ordered that the judgment be affirmed, appellants, except Mrs. Elliot, paying costs of appeal, and so far as relates to Mrs Elliot costs to be paid by Mrs. Burke.

MORGAN, J., *dissenting*. I dissent from the opinion of the majority of the court, and reserve the right to give my reasons therefor hereafter.

Rehearing refused.

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No. 3935.

FRANCIS C. MAHAN v. A DUBUCLET, State Treasurer. JOSEPH HERNANDEZ and PATRICK FRIZZEL, Intervenors.

Where one of two innocent persons must suffer a loss through the misconduct of another, the loss ought rather to fall upon him who put it in the power of the third party to inflict the injury.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. S. P. Blanc and John Ray*, for plaintiff and appellant. *Hays &*

New, for defendant and for P. Frizzel, intervenor, appellees. *Honor & Benedict*, for Joseph Hernandez, intervenor and appellee.

TALIAFERRO, J. The plaintiff brought this suit against the defendants to recover from their possession two State warrants, each for the sum of \$1523, bearing respectively the numbers 2025 and 2026, and issued by G. M. Wickliffe, the Auditor of the State, on the thirteenth of July, 1869. The warrants were sequestered and released under bond. Hernandez and Frizzel intervened; the former claiming to be owner of warrant No. 2026, the latter to be owner of warrant No. 2025. The answer of defendants is a general denial. The intervenors had judgment sustaining their titles to the warrants. There was judgment in favor of defendants, dismissing the plaintiff's suit as to them at plaintiff's costs.

The plaintiff has appealed.

The facts seem to be these. The plaintiff, in December, 1869, at the request of Wickliffe, Auditor of Public Accounts, let him have possession of the two warrants to exhibit before a committee of the Legislature then investigating certain charges against him, and plaintiff took from him a receipt for the warrants. Wickliffe disappeared soon after without returning the warrants, and plaintiff was unable to get any trace of them until some time after he ascertained they had been presented at the Treasurer's office for payment. No advertisement or notice of the loss was given by the plaintiff. The allegations of the intervenors that they are *bona fide* holders under the blank indorsement of Keefe, to whom the warrants were issued; that they gave a valuable consideration for them in due course of trade, without notice of the plaintiff's claims, seems to be sufficiently well authenticated.

The rule that seems applicable in this case is, that where one of two innocent persons must suffer a loss through the misconduct of another, the loss ought rather to fall upon him who put it into the power of the third party to inflict the injury. By delivering possession of the warrants to Wickliffe, the plaintiff enabled the latter to throw them upon the market, which under all the facts and circumstances shown, and in the absence of any explanations on his part, the presumption is that he did so.

We think the decree of the lower court correct.

Judgment affirmed.

Dunning v. Coleman & Co.

No. 3920.

MRS. O. K. DUNNING v. JOHN COLEMAN & CO.

Judgment having been rendered in favor of John Coleman & Co., with privilege on a certain piece of property on Rampart street, New Orleans, which privilege was for having paved the street in front thereof, said property was sold by the sheriff and bought by John Coleman. It had been previously mortgaged to the plaintiff for a sum in excess of the amount realized at the sale. Mrs. Dunning, the plaintiff, issued executory process, and the sheriff declined to sell the property under her mortgage, as he had already sold it under Coleman's privilege. Mrs. Dunning now sues John Coleman & Co., to have the sale rescinded and her mortgage declared to have priority over Coleman's privilege.

Article 684 of the Code of Practice and article 3274 of the Civil Code of 1825, which has not been repealed or changed by any special legislation, govern this case. The act of 1840, on which the defendants rely, even if that act were admitted to be in force now—a point on which no opinion is expressed—gives them the privilege claimed, but on certain conditions. When they were complied with, it was too late to have any effect on the plaintiff's mortgage.

The Statute of 1840 does not, in any manner, repeal or change the article of the Code above quoted, in regard to the time when the privilege shall be recorded. It simply fixes the length of time which the privilege is to endure. As the privilege under which the sale took place was not superior to the plaintiff's mortgage, and as the price bid was not sufficient to pay her mortgage, it follows under the article of the Code of Practice above cited, that there was no legal adjudication, and therefore that there was no sale.

The court *a quo* did not err in consulting plaintiff as to the claim she made against Coleman, to cause him to make restitution of the rents received by him since the sale, to be placed to the credit of her debtor. The plaintiff would have had no authority for making these rents responsible for her debt, if the property had remained in the hands of her debtor. Her rights rested on the realty and not on its revenues.

APPPEAL from the Seventh District Court, parish of Orleans. *Colemans, J. Cooley & Phillips, E. Filleul*, for plaintiff and appellee. *Hornor & Benedict*, for defendants and appellants.

MORGAN, J. On the seventh May, 1869, Edmund Murphy executed his promissory note for \$6000, payable to his own order twelve months after date. The payment of the note was secured by special mortgage on certain real estate in this city. The mortgage was recorded in the mortgage office on the tenth May, 1869.

Coleman & Co. paved the street in front of this property. The work was done under the authority of the Council. The authority was first given on the thirtieth August, 1860, and the work was to have been completed in two years; but in 1868 the time was extended to the first November, 1870. The contract was recorded on the eighteenth May, 1870, nearly two years after it had been agreed upon, and nearly one year after the mortgage. Coleman obtained judgment for the amount of his claim, and caused the property to be sold to satisfy it.

The plaintiff took out an order of seizure and sale against the property. Her suit was returned by the sheriff, in consequence of the property having been previously sold under Coleman & Co's judgment.

Plaintiff seeks to annul the sale, and to cause the privilege of Coleman & Co. to be erased from the books of the mortgage office, to the extent, at least, that it shall confer no priority over her mortgage.

The property sold for less than the sum due to the plaintiff.

The 684th article of the Code of Practice provides, that "if the price bid is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication, and the sheriff shall proceed to seize other property of the debtor, if there be any." If there was no legal adjudication, there was no sale. There certainly was no legal adjudication if the defendants' asserted privilege had no preference over the plaintiff's mortgage.

Privileges are *stricti juris*, and, whether the result of general laws, or special statutes, must be rigidly construed.

Now the article 3274 of the C. C. declares that "no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was entered into." This article, found in the Code of 1825, has not been repealed or changed by any special legislation. The act of 1840, under which the defendant claims (admitting it to be in force, upon which it is not necessary to express an opinion) gives the privilege claimed, but it provides "that the privilege which secures the reimbursement as aforesaid for paving shall only exist when an account of said paving, certified by the treasurer and comptroller of the said municipality, shall be duly recorded in the office of the Register of Conveyances in this city, and provided said privilege shall exist for two years only after the tax has become due."

There is, therefore, no privilege until the work is done, and when the work is done the privilege interferes with no one until it has been duly recorded. "Duly recorded" means recorded in compliance with the requirement of law. The requirement of the law is that it shall be recorded on the day when the evidence of debt was given. That day was the twenty-eight February, 1870. It was not recorded until the eighteenth day of May following. It was too late for it to have any effect upon the plaintiff's mortgage, for this statute of 1840 does not, in any manner, repeal or change the article of the Code above quoted, in regard to the time when the privilege shall be recorded. It simply fixes the length of time which the privilege is to endure.

As the privilege under which the sale took place was not superior to the plaintiff's mortgage, and as the price bid was not sufficient to pay her mortgage, it follows, under the article of the Code of Practice cited, that there was no legal adjudication, and, therefore, that there was no sale. The judgment of the court below, in this regard, was correctly rendered.

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Appellee contends that there was error in the judgment which non-suited her as to the claim she made against defendants to cause him to make restitution of the rents received by him since the sale, to be placed to the credit of her debtor. We think the district judge was right. The plaintiff would have had no authority for making these rents responsible for her debt if the property had remained in the hands of her debtor. Her rights rested on the realty and not on its revenues; what became of them is no concernment of hers.

Judgment affirmed.

Rehearing refused.

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No. 4025.

BANK OF NEW ORLEANS v. WESTERN UNION TELEGRAPH COMPANY.

This is a suit to recover the amount of losses sustained in consequence of incorrect information given by defendants, in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York. The defense is, that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company placed for convenience in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. This does not exonerate them from liability, because by their contract they were bound to carry to plaintiffs correct information, which they could have obtained without relying on the indicator.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard J. A. & W. Voorhies*, for plaintiffs and appellees. *Semmes & Mott*, for defendants and appellants.

WYLY, J. The defendants, who were employed to furnish the plaintiffs with daily reports, indicating the fluctuations of the money market of New York, delivered a telegram to them on the second of November, 1869, reporting gold at 12 M. at 128 $\frac{1}{2}$, whereas the true rate of gold at New York at that hour was 127 $\frac{1}{2}$.

The plaintiffs alleging that they were induced by this telegram to buy foreign exchange to the amount of \$173,816 15, sue the defendants for \$1738 16, the amount of loss they sustained by said purchase, by reason of the erroneous report in said telegram rating gold at one per cent. higher than it was in New York at that day and hour. The court gave judgment for plaintiffs for the amount prayed for, and the defendants appeal.

There is no controversy as to the facts, the allegations of the plaintiffs being fully proved.

The defendants, however, contend that the error in the telegram was owing to no fault of theirs; that the information conveyed in the telegram was taken from the indicator of the Gold Stock Company of

Bank of New Orleans v. Western Union Telegraph Company.

New York, a corporation distinct from the defendants, and the error occurred in the working of the indicator. It is true the error resulted from a defect in the working of the indicator of the Gold Stock Company, placed for convenience in the office of the defendants in New York; but this did not exonerate them from liability, because by their contract they were bound to convey to the plaintiffs correct information, which they could have obtained without relying on the indicator.

Failing to comply with their contract, the defendants conveyed to the plaintiffs incorrect information, whereby they sustained the loss complained of.

Judgment affirmed.

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v
No. 5431.

HENRY SAMORY v. Widow SAMUEL M. MONTGOMERY.

According to plaintiff's own statement, his claim is based on the balance due him on a judgment in his favor of the Third District Court, parish of Orleans, against S. M. Montgomery, which judgment, by execution issued thereon, was not satisfied in full. The judgment of the Third District Court was rendered on the twelfth of December, 1863; it was affirmed on the tenth of June, 1867. Meanwhile the property was seized, and, on the fifth February, 1864, was sold to plaintiff, who claims that there is a balance of \$7002 due him on the judgment.

This present suit was instituted in the Second District Court, parish of Orleans, against the representatives of the said S. M. Montgomery, deceased, to cause the plaintiff to be recognized as a creditor of the estate in the above amount to be paid in due course of administration.

It has been decided that a devolutive or suspensive appeal from a final judgment of a district court, does not suspend prescription pending the appeal. Therefore prescription, running in this instance from the twelfth December, 1863, the day on which the judgment relied on by plaintiff was rendered, which judgment was affirmed on the tenth January, 1867 was not interrupted by this suit instituted on the fifth of December, 1871, and fixed for trial on the eleventh September, 1874, on motion of plaintiff's counsel, when, on that day, the defendant filed the plea of prescription.

To revive a judgment, citation must issue from the court which rendered it. To revive the judgment sought to be enforced in this case, citation should have issued from the Third District Court.

The suit in the Second District Court can in no sense be considered as a suit to revive the judgment of the Third District Court, and if it were, the second court, under the statute of 1853, had no power to revive it. Hence the foundation on which the plaintiff's claim rests, to wit, the judgment of the Third District Court, has been destroyed by time.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. J. L. Tissot, Randall Hunt*, for plaintiff and appellee. *Thos. Hunton*, for defendant and appellant.

MORGAN, J. Plaintiff was the owner of four promissory notes executed by S. M. Montgomery, three of which were executed on the twenty-fourth May, 1861, for \$5000 each, and one on the thirteenth January, 1862, for \$640. The notes were secured by mortgage.

On the tenth November, 1863, plaintiff instituted suit against Montgomery in the Third District Court of New Orleans, to recover the

Samory v. Montgomery.

amount of these notes and to make the property mortgaged liable therefor. At the time the suit was instituted, Montgomery was not in New Orleans. A curator *ad hoc* was appointed to represent him. The Third District Court on the twelfth December, 1863, rendered judgment in favor of the plaintiff for, First—\$15,000; Second—\$650; and Third—\$782, attorney's fees with lien and privilege on the property mortgaged. On the fifteenth July, 1865, the defendant, Montgomery, appearing in his own name through counsel, moved the court for a devolutive appeal, which was granted. Pending the appeal Montgomery died. His widow qualified as natural tutrix to their minor child and made herself, through her counsel, a party to the suit.

On the tenth of June, 1867, the judgment of the district court was affirmed. In the meanwhile execution had issued on the judgment, the property mortgaged was seized and, on the fifth February, 1864, sold to the plaintiff. Plaintiff claims that there is a balance of \$7002 60 due him on the judgment.

This suit is instituted against the representative of the succession of Montgomery to cause the plaintiff to be recognized as a creditor of the estate in the above amount, to be paid in due course of administration. The petition was filed on the fifth December, 1871. The answer was filed on the twenty-first December, 1871. The case seems to have lingered along until the first September, 1874, when, on motion of plaintiff's counsel, it was fixed for trial on the eleventh September, 1874.

On that day the defendant plead the prescription of five and ten years.

To take the case as stated by the counsel for plaintiff. The action is based, either on the judgment of the Third District Court of New Orleans, or on the notes secured by mortgage on which that judgment was obtained. His position is that in neither case was prescription acquired on the fifth December, 1871, when the present suit was instituted. He states the proposition that a legal interruption of prescription takes place when suit has been instituted before a court of justice against the debtor. The authorities he brings forward to support his position probably do so. And if taken thus broadly stated, his answer would be complete. But according to his own statement the claim of plaintiff is based on the balance due him on the judgment in his favor of the Third District Court, which, by execution issued thereon, was not satisfied for its full value. It is, therefore, he says, a claim based on a judgment affirmed by this court. The judgment of the Third District Court, as we have seen, was rendered on the twelfth December, 1863. It was affirmed on the tenth June, 1867.

He contends, first, that prescription commenced to run on this judgment on the tenth June, 1867; and second, that this suit having been

instituted on the fifth December, 1871, prescription had not then been accomplished, and that it was interrupted by the suit.

First—In the case of *Arrowsmith v. Durell*, 21 An. 295, it was expressly decided that a devolutive appeal from a final judgment does not suspend or interrupt prescription pending the appeal.

In *Walker v. Succession of Hays*, 23 An. 176, it was held that a suspensive appeal did not interrupt prescription, which, the court said began to run on the day the judgment of the District Court was signed. And, in the case of *Byrne, Vance & Co. v. Garrett*, 23 An. 587, the same conclusion was reached. We may, therefore, conclude that his first proposition is not supported by authority.

Second—In *Wade v. Caspari*, 24 An. 211, it was held that a judgment is prescribed by the lapse of ten years from its rendition. And in the succession of *Hardy* 25 An. 489, it was held that the prescription of a judgment can only be averted by complying with the requirements of the act of 1853.

The act of 1853 provides that "all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgment, provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment." R. S. No. 2813.

Now the directions of the statute are positive. To revive a judgment, citation must issue from the court which rendered the judgment. To revive the judgment now sought to be enforced citation should have issued from the Third District Court. This was not done.

It is, however, contended that inasmuch as the judgment was not prescribed when this suit was instituted, prescription was interrupted. But while this case was sleeping on the docket of the Second Court, prescription was running against the judgment in the Third Court. Nothing prevented the plaintiff from instituting proceedings to revive the judgment. Instead of doing this he instituted proceedings to have the judgment paid by the tutrix in due course of administration. When he came to try his case, the foundation upon which it rested—the judgment—had been destroyed by time. The suit in the Second Court can in no sense be considered as a suit to revive the judgment of the Third Court, and if it were, the Second Court, under the statute, had no power to revive it.

We conclude, therefore, that the plea of prescription must prevail. It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided annulled and reversed, and that there be judgment in favor of the defendant with costs in both courts.

Rehearing refused.

No. 3130.

WILLIAM H. JOHNSON v. CANAL AND CLAIBORNE RAILROAD COMPANY.

It is true that the *allegata* and the *probata* must agree, but it is sufficient if the substance of the issue be proved. The real substance in this case is not where the plaintiff was, to a mathematical precision, when he was injured; but first, whether he did suffer, and secondly, whether, if he suffered, it was from the fault of the defendant.

But where the conduct of the plaintiff has been negligent and has contributed to the injury received, he can not recover, even though the defendant be in fault, and such is the fact in this instance. The damage done to plaintiff was in part the result of his own carelessness. He can not therefore, make the railroad company responsible for a disaster which he brought to some extent upon himself.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Jury trial. *John H. Kennard*, for plaintiff and appellee. *H. D. Ogden*, for defendant and appellant.

MORGAN J. The petitioner alleges that on the night of the twelfth of November, 1869, between the hours of ten and eleven, at a point on Canal street, between Baronne and Carondelet, while exercising his privilege as a citizen, of walking the streets, proceeding on foot down the sidewalk of the neutral ground on Canal street, on the right hand side of said neutral ground, and going towards the Mississippi river from the direction of Baronne street, he was knocked down, run over, and had one of his legs so terribly crushed by car No. 18, belonging to the Canal and Claiborne street Railroad Company, drawn by one of the company's mules, and driven by an agent and employe of said company, that it was necessary to have his leg amputated, and he was thereby made a cripple for life.

On the trial the plaintiff, when examined as a witness, said that when the defendant's car ran over him he was walking on the track of the railroad. His testimony was objected to on the ground that it did not correspond with the allegation in his petition, which was that when the accident happened he was proceeding down the walk of the neutral ground on Canal street. It is true that the *allegata* and the *probata* must agree. But we understand that it is sufficient if the substance of the issue be proved. Now the real substance of the issue in this case is not, to a mathematical precision, where the plaintiff was when the terrible calamity of which he is the victim overtook him, but first, whether he did suffer, and second, whether if he suffered it was from the fault of the defendant. We think the testimony was properly received. As to the first point, we think it fully established that the defendants' car did the deed. As to the second point. The general propositions that every person is responsible for the damage he occasions, not merely by his act, but by his negligence, imprudence, or want of skill; that we are responsible not only for the damage occasioned by our own act, but for that which is caused by the acts of

persons for whom we are answerable, or of the things which we have the custody, is not disputed. Neither can it be denied that a railroad company is responsible for the damages caused by its servants. They have been constantly made to pay the injuries which they have occasioned, where the injuries have been the result of carelessness or bad management of their servants.

But where the conduct of the plaintiff has been negligent and has contributed to the disaster, he can not recover, even though the defendant be in fault. This is the language of this court in the case of *Knight v. Pontchartrain Railroad Company*, 23 Au. 462, in which this whole doctrine was considered and where all the authorities which could be found upon the subject are referred to. We are satisfied that that case was properly decided, and our inquiries must now be directed to the question of negligence on the part of the plaintiff.

In the centre of Canal street, on what is known as the neutral ground, there are four railroad tracks; two belonging to the City Railroad, and two belonging to the defendants. Those belonging to the defendants run near the edge of the neutral ground, those belonging to the City Railroad, in the center. Both lines of road traverse a thickly settled portion of the city, and their respective cars are almost constantly going and coming. The space between the side of the neutral ground and the defendants' track is narrow. The space between the different tracks is limited. The starting point for the City Railroad cars is between Carondelet and St. Charles streets. The defendants' cars cross St. Charles street and go towards the levee.

The plaintiff's residence is in the lower part of the city. To reach there he uses the City Railroad cars. At about half past ten o'clock of the night of the twelfth of November, 1869, he came down Baronne street to take the Bayou road cars. These cars start from a point between St. Charles and Carondelet streets. Under these circumstances what would have been the course of a prudent man? He would have waited on the corner of Canal and Baronne for his car. Or, if he wished to take the car at its point of departure, he would have gone up Canal street on the upper side until he got opposite his car, and then crossed the street. Instead of this he crossed Canal street one square and a half below the point where he wished to take the car, and up the neutral ground. Even here if he had walked on the flagging which intervenes between the railroad track and the street proper he could have done so with comparative safety. But, from his own evidence, he was walking on the track itself when the disaster occurred to him. Two roads were open to him. One, absolutely free from risk of any kind; the other, full of danger. He chose the latter, and no matter how much we may regret the circumstance of his calamity, we

feel constrained to say that it was in part the result of his own carelessness. He can not therefore make the railroad company responsible for a disaster which he brought to some extent upon himself.

This opinion does not in any manner clash with the decision in Barksdall's case 23 An. 180. There the child was run over while endeavoring to cross St. Charles street on the upper crossing of St. Mary street. He was then in the proper place and pursuing the route which was the only one he could safely have taken. He did not, therefore, contribute to the negligence which caused him to suffer. It was the driver of the car who was alone to blame for the accident.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

TALIAFERRO, J., *dissenting*. The inquiry in this case is simply: could the accident have been prevented by the exercise of that degree of attention and care by the car driver which it was his duty to exercise in order to avoid accidents? What is a car driver required to go at a moderate speed for, if it is not to avoid accidents? What is he required to be circumspect in driving for, if it is not to avoid running over people? Why is he required to be constantly on the alert while moving, to look ahead and around, if it be not that he may go along with safety among the thousands of persons constantly on the streets? Now, these are the obligations he is under, and if he does not fulfill them he fails in his duties to the public and to his employers. I imagine there is no more common thing than that of accidents being prevented by the vigilance and skill of car drivers slackening their speed or stopping their cars, on occasion when there is danger of collision with other vehicles or of running over a person. Such prevention of accidents I doubt not, happens daily. The evidence is perfectly satisfactory to me, that if the car driver in this case had been doing his duty, this accident might certainly have been prevented; that Johnson's being on the track did by no means render the accident inevitable. Grant that he was imprudent in being on the track, still, it is clearly shown by proof, that if the car driver had been doing his duty, he might easily have avoided running over the man. One witness says that at the point where this accident happened, it was light enough to see to pick up a pin. The witness Martin, sitting near in his cab, and viewing the scene distinctly, is positive in his statement that if the car driver had been driving as he ought to have done, he might have avoided running over him." This witness swears that at the time of the disaster, the car driver was talking with a man standing in the car near the door. He was driving at an unusual speed. One witness thought at about the rate of ten miles an hour. A policeman who pursued the

car after the accident, in order to identify it, saw more of his reckless driving. The policeman swears that the car driver made no stop whatever upon the happening of the accident, but went rapidly on and was near running over two other persons on the course at the Clay statue. It is clear to me from the evidence that this driver is an ignorant and stolid man of a reckless character, having no experience in the business he was engaged in, when he ran the car over Johnson. He was introduced as a witness on behalf of the defendants, but with little advantage to them. It was drawn out of him on cross examination that the defendants had discharged him subsequently to this accident, on account of a collision between the car he drove and a steam car, and he admitted he was in fault for the happening of the collision. If then, under ordinary prudence and care, and by bestowing the attention upon his business that his duty required; if he had been driving at a moderate and safe speed, and looking forward and around him instead of being engaged in conversation with the young man standing at the door near him, he might without any difficulty have avoided running over the plaintiff. How stands the matter? Here an accident occurred which the car driver had it entirely in his own power to prevent, and yet he did not prevent it. No co-operative act on the part of the plaintiff was necessary to enable the car driver to obviate the accident. There was clearly then in this case, no contributory negligence. All the facts in this case place it in that class of cases defined by this court, in 23 An. 464 (*Knight v. Pontchartrain Railroad Company*) under the second head as follows: "Where the conduct of the plaintiff has been imprudent or negligent, but such imprudence or negligence has not contributed to the accident. In such case the plaintiff may recover from a defendant in fault." Can a person be said to have contributed to an accident unless by his own act he has placed it out of the power of the other party to prevent it when this other party might otherwise have done it? Take the case at bar, and suppose the facts in regard to the victim to have been different from what they are shown to be. Suppose the driver, going as he was, at an unusual and unwarrantable speed, reckless of accidents, and Johnson had rushed rapidly upon the track directly ahead of the mule and car so that the driver could not if he had aimed to do it, prevent his being killed or crippled and we have a case of contributive negligence. Many cases of what is termed contributive negligence occur. Far the greater number that appear in our reports belong to this class. But the facts of the case at bar are far different from those presented in any of the cases of that class. Johnson, it is shown, was sufficiently far in advance of the car, for a driver of ordinary prudence and care going at the customary speed, to have stopped his car before reaching him and thus

have prevented the accident. It is a case in my opinion coming distinctly under the second class of cases as defined in Knight's case, 23 An. 464, viz: that although a party may have been imprudent or negligent, yet, where by his negligence or imprudence he has not contributed to the accident he may recover from a party in fault.

In this case it was entirely at the volition of the driver to run over the man or not. Having done so, he and his employers should be responsible for the consequences.

I think the plaintiff should recover damages.

WYLY, J., *dissenting*. I concur in the dissenting opinion of Mr. Justice Taliaferro.

Rehearing refused.

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No. 3867.

JAMES J. O'HARA v. HENRY BLOOD.

Where the defendant, being sued for the payment of a certain sum in consequence of the construction of banquettes in front of his property in Locust street, averred that the city of New Orleans had not complied with the formalities set forth in the city charter in this—that one-fourth of the owners of real property fronting on said unbanquetted street did not petition for the banquetting alleged to have been done in that locality;

Held—That a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed in that street, being found in the record, it must be supposed, in the absence of rebutting evidence, on the principle of *omnia presumuntur rite esse acta* that the persons petitioning constitute one-fourth of the property owners on that street.

APPPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Hornor & Benedict*, for plaintiff and appellee. *J. A. Rosier*, for defendant and appellant.

TALIAFERRO, J. The petition alleges that the defendant is indebted to him in the sum of seven hundred and forty-two dollars and thirty-six cents, with eight per cent. interest thereon from the nineteenth November, 1870, for having constructed banquettes in front of the defendant's property on Locust street, in conformity with a contract entered into between the city and Patrick Harnan, who transferred all his right and interest in said contract to petitioner.

He prays judgment for the above sum, and interest with special privilege on defendant's property on the Northwest side of Locust street, between Philip and Jackson streets.

The answer is a general denial. The defendant avers that the city of New Orleans has not complied with the formalities and requisites set forth in the city charter in this, that one-fourth of the owners of real property fronting on the unbanquetted street referred to in the petition, did not petition for the banquetting alleged to have been

done at that locality; that the petition was not published during the requisite time, and that the City Council never passed any resolution authorizing the said banquetting.

There was judgment in favor of the plaintiff in the court below as prayed for in the petition, and the defendant has appealed.

A review of the record satisfies us that the plaintiff has made out his case. We find a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed on that street. On the principle that *omnia presumuntur rite esse acta*, we must suppose that the persons petitioning constitute one-fourth of the property owners on that street. The defendant has offered no evidence to rebut the presumption. A resolution of the City Council is shown accepting the bid of Harnan; and also we find the contract entered into between him and the city for the doing of the work, and the proper evidence showing that the work was performed according to the contract by the plaintiff, to whom the contract was assigned by Harnan.

The decree of the lower court we think correct.

Judgment affirmed.

Rehearing refused.

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No. 2738.

CULVER, SIMONDS & Co. v. H. J. LEOVY, B. B. HART et al.

In this instance the main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court as to discharge one of them, the Delta Newspaper Company, and hold the other two liable jointly and not *in solido*, and therefore the surety is not liable for the amount of the judgment so rendered. The Code of Practice provides that the appellant shall satisfy whatever judgment may be rendered against him, and that the surety shall be liable in his stead. The language used is plain and expressive—that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law. The defense he sets up is more specious than weighty.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Merriek, Race & Foster*, for plaintiffs and appellants. *B. H. Marr, F. A. Monroe*, for B. B. Hart, defendant and appellee.

TALIAFERRO, J. The plaintiffs obtained judgment *in solido* against the Delta Newspaper Company, as maker, and Leovy and Duncan as indorsers of a promissory note.

Defendants appealed giving Barnett B. Hart as their surety on the appeal bond. The court reversed the judgment, dismissed the suit against the Delta Newspaper Company, and condemned Leovy and

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Duncan jointly, each for his virile share. 19 An. 202. Execution was issued and returned *nulla bona*. Proceedings were then taken against the surety on the appeal bond, and the litigation was protracted and carelessly conducted. On the second December, 1869, another rule was taken against Hart, the surety, to render him liable. After a hearing the rule was dismissed and the plaintiffs have appealed. The main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court, as to discharge one of them, the Delta Newspaper Company, and held the other two liable jointly and not *in solido*, and, therefore, the surety is not liable for the amount of the judgment so rendered. The Code of Practice, article 579, prescribes the conditions upon which the surety is required to bind himself; these are, "that the appellant shall satisfy whatever judgment may be rendered against him, etc., and that the surety shall be liable in his stead."

We think the language used is plain and expressive; that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law, and we think the defense he sets up more specious than weighty.

It is therefore ordered that the judgment appealed from be annulled and reversed. It is further ordered that the rule be made absolute, and that the plaintiffs receive from Barnett B. Hart, surety on the appeal bond, the amount of the judgment, interests and costs obtained by them against Duncan and Leovy, and all costs of these proceedings.

No. 5287.

HIBERNIA NATIONAL BANK ET ALS. v. SAMUEL SMITH ET ALS.

Nathaniel Montross, of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison to secure the payment of promissory notes on which this suit was brought. The mortgaged property was sold and adjudicated to plaintiffs. The amount due on the debt for which the property was seized, was paid, and the remainder of the proceeds of the sale was retained to pay prior incumbrances. The city of New Orleans claimed as due for unpaid taxes against the property a certain sum of money with interest and costs and attorney's fees, and alleged the city's right to be paid in preference to any other creditors. The State tax collector for the First District of New Orleans excepted to the jurisdiction of the court, showed that the State has a first privilege upon the property for all taxes and can not be called in as an ordinary creditor as aimed at by plaintiffs.

But Smith & Co., who held certain mortgage notes, drawn by Jamison and secured also by first mortgage, took executory proceedings against the said property which plaintiffs have enjoined. They have made parties to this suit as in a kind of *conoursus*, the city of New Orleans, claiming a sum due for taxes, also the State tax collector of the First District of New Orleans and Nathaniel Montross, holder of the notes and mortgage under which the property was sold, and they have prayed that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison, according to their respective rights of mortgage and privilege.

The court *a qua* maintained the exception of the State tax collector, gave judgment in favor of the city for a certain amount of taxes with lien and privilege on the property, and dissolved plaintiffs' injunction.

The judge below erred only so far as he gave judgment in favor of the city for taxes. It would be in time after the execution of the order of seizure and sale now pending, to present the claim for taxes, reserving to the city her right to be paid the taxes due, out of the proceeds of the sale when made.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. A. & W. Voorhies*, for plaintiffs and appellants. *Finney & Miller*, for defendants and appellees. *Walsh*, for the city of New Orleans.

TALIAFERRO, J. The Hibernia Bank, the Citizens' Bank and the New Orleans National Banking Association, as plaintiffs, institute this action by injunction to restrain and prohibit the defendants from proceeding to sell under executory process certain real estate situate in New Orleans, upon which they hold a mortgage first in rank.

The plaintiffs allege that they are the owners of this property, setting forth that they bought it at a sheriff's sale previously provoked by the defendants under an order of seizure and sale obtained by them against one Jamison the former owner of the property, and predicated as it seems upon a junior mortgage.

The plaintiffs made parties to this suit, the city of New Orleans, claiming a sum due for taxes on the property, also the State tax collector of the First District of New Orleans, and Nathaniel Montross holder of the notes and mortgage under which the property was sold, were made parties in a kind of concursus and the plaintiffs pray that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison according to their respective rights of mortgage and privilege.

The answer admits that under a previous order of seizure and sale against the property of Jamison, the defendants caused the said property to be seized and advertised for sale and they reiterate the allegations set forth in their petition in that case and make the proceedings therein a part of their answer in this case. They specially deny that the plaintiffs are the owners of the property in question. They deny the plaintiffs' right to the injunction and pray that the same be dissolved with damages and for general relief, etc.

During the progress of the case, the Hibernia Bank and the Citizens' Bank having effected an agreement or compromise with the defendants, withdrew from the case, leaving the New Orleans National Banking Association the sole plaintiff.

The judgment of the court below dissolved the injunction with five per cent. damages against the plaintiff, on two-fifths of the amount enjoined, viz: the amount collectible on the executory process, principal interest and attorneys fees, calculated to the date of the issue of

the injunction and two-fifths of the costs down to the twelfth of January, 1874.

From this judgment the plaintiff has appealed. The facts of this case appear to be, that on the nineteenth of December, 1872, Nathaniel Montross of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison. The suit *via executiva*, was based upon two promissory notes of \$5000 each; these notes being two of a series of three, each for \$5000. The mortgaged property was seized and sold on the eighteenth February, 1873; the three original plaintiffs in this case became the purchasers at the price of \$52,900. It seems they paid the amount due on the debt for which the property was seized and retained in their hands the remainder to pay prior incumbrances. The city of New Orleans claimed, as due for unpaid taxes against the property, \$7448, together with interests and costs and attorneys fees, and alleged the city's right to be paid this sum in preference to any and all other creditors. The State tax collector for the First District of New Orleans excepted to the jurisdiction of the court—showed that the State has a first privilege upon the property for all taxes and can not be called in as an ordinary creditor as aimed at by plaintiffs. The judgment in this case already referred to awarded the city the sum of \$5775 for taxes, with lien and privilege upon the property in contest, and sustained the exception of Folger, the State tax collector.

After the first seizure, the one under which the sale was made, Montross held the other mortgage note of the same series of three of \$5000 each, and he held besides \$12,500 in notes of Jamison secured by first mortgage on the same property. S. Smith & Co., also held mortgage notes of Jamison to the extent of \$12,500 secured by the first mortgage; upon this amount Smith & Co., in May, 1873, took executory proceeding against the property and it is upon these proceedings that this injunction suit is founded, being number 5287.

In November following, Montross proceeded *via executiva* on his three notes for \$17,500, and caused the property to be seized and advertised for sale. Thereupon the plaintiffs aforesaid again resorted to injunction to stay and prevent the sale, forming the suit number 5286.

In this case, No. 5287, we see no sufficient object there would be in remanding it. In the case 5286, Montross answered without excepting to the jurisdiction. Judgment was rendered in each case on the same day. We think in the case No. 5287 the decree is erroneous so far as it renders judgment in favor of the city for taxes and correct as to dissolving the injunction. It will be in time, after the execution of the order of seizure and sale now pending, for the claim for taxes to be presented. Reserving to the city her right to be paid the taxes due out of

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the proceeds of sale when made, it is ordered that the judgment appealed from so far as it condemns the plaintiff to pay the city \$5775 for taxes with interest and costs, be annulled and reversed and that the judgment as thus altered and amended be affirmed. The appellees paying costs of this appeal.

Rehearing refused.

No. 5286.

HIBERNIA NATIONAL BANK ET ALS. v. NATHANIEL MONTROSS ET ALS.

The decision in this case stands on the same ground as the preceding one, No. 5287, and is governed by it.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. A. W. Voorhies*, for plaintiffs and appellants. *Finney & Miller*, for defendants and appellees.

TALIAFERRO, J. This case arises, like the one just decided (No. 5287), out of the injunction proceedings instituted by the plaintiffs against executory orders taken out by S. Smith & Co. and N. Montross against property of Jamison subject to their mortgages.

The injunction in the case now before us stands upon the same ground as the one in No. 5287, to which we refer.

In this case, on review of the evidence and the law applicable to it, we see no reason to disturb the judgment appealed from. It is ordered therefore that the judgment appealed from be affirmed with costs.

No. 3592.

CHARLES L. RICHARDSON v. LACEY, TERRY & CO.

Judgment having been rendered against the defendants, as a firm, and the individual members thereof *in solido* for the amount of a note of the firm, there was another judgment in the same instance against Terry, one of the firm, for the same debt, on a rule against him as garnishee; this was an error; and an order making a rule upon him absolute to forthwith deposit in court sufficient cash or assets to satisfy the judgment against him as garnishee, was another error. Terry was not a third person in contemplation of the law applicable to garnishees; he was one of the defendants; judgment had been rendered against him individually and as a member of the firm. The second judgment, under a *feri facias* against the "defendants," added nothing to his liability.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Dirrhammer & Kennard*, for plaintiff and appellee. *Cooley & Phillips*, for defendants and appellants.

HOWELL, J. Three appeals come up in this record; one by the defendants from a judgment against the firm and the individual members thereof *in solido*, for the amount of a note of the firm; one by L. H. Terry, one of the members, from a judgment against him for the same debt, on a rule against him as garnishee, and another by him

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from an order making a rule absolute to forthwith deposit in court sufficient cash or assets to satisfy the judgment against him as garnishee.

The first judgment is correct, it being presumed that the judge had evidence before him to justify it; but we think the other two without authority in law. Terry is not a third person in contemplation of the law in reference to garnishment. He was cited as defendant, and judgment was rendered against him individually and as a member of the firm, and the second judgment, under a *fiat facias* against the "defendants," added nothing to his liability. He was one of the defendants, and not a third person.

It is therefore ordered that the judgment against the defendants, signed on the eighth of February, 1871, be affirmed, and it is further ordered that the judgment against Lucius H. Terry, signed on twenty-seventh June, 1871, and the order of third July, 1871, making absolute the rule on him to deposit cash or assets in court be reversed and annulled, with his costs in said proceedings in the lower court. The plaintiffs and defendants, appellees, to pay costs of appeal.

No. 3575.

MEYERS AND WINEHILL v. THE GERMANIA INSURANCE COMPANY—
COCHRAN & Co. et als., Subrogated.

Before the party insured can recover on his policy, the express condition to prevent the forfeiture of the policy—which is—that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing, must be shown to have been complied with.

The propriety of such a clause in a policy of insurance is particularly apparent in this case on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cotton & Levy*, for plaintiffs and appellants. *C. F. Schmidt*, for defendants and appellees.

TALIAFERRO, J. The plaintiffs, it seems, insured with the defendants on the fourth of October, 1864, a stock of ladies and gentlemen's fancy and furnishing goods, contained in a three story brick building having a roof of slate, situated on Canal street, between Burgundy and Rampart streets, for the period of one year, to the amount of five thousand dollars. On the night of the twenty-ninth of May, 1867, the building was destroyed by fire, causing the plaintiffs a heavy loss from the destruction by fire of a large portion of their goods. After an ineffect-

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ual effort to obtain indemnity from the insurers under the policy, the plaintiffs brought this action.

The defendants answer that they are not bound under the contract for the reason that the plaintiffs on the twelfth of December, 1866, effected an insurance on the same stock of goods to the amount of five thousand dollars with the National Marine and Fire Insurance Company, without notice thereof to the defendants until after the occurrence of the fire; that the said policy of insurance entered into between the plaintiffs and defendants in this case, contains the following express clause, viz: "If the said insured or their assigns shall hereafter make any other insurance on the same property and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect."

In the court below there was judgment in favor of the defendants, and plaintiffs have appealed. Two bills of exceptions are found in the record relating to the admission of testimony. The plaintiffs introduced Winehill, one of the plaintiffs, to establish that he had presented the policy taken with the National Marine and Fire Insurance Company, on the same property, to the president of the Germania Insurance Company, and that the latter replied to him: "It is not necessary except in case of fire to send us notice." The testimony of a brother of Winehill's, was also introduced to establish that Gustave Winehill, one of the insured and a plaintiff in the case, took from a safe belonging to the witness, the policy taken by the plaintiffs with the National, and also that taken by them with the Germania, and go over to the office of the latter for the purpose of presenting them to the president of the Germania. To all this testimony the defendants objected, being inadmissible, as they averred, to establish notice of the subsequent insurance with the National by parol evidence. The objection was overruled and the testimony admitted. We think the exception was well taken. But if the testimony were admissible, it falls short when closely examined and weighed with the plaintiffs' evidence to establish "notice with all reasonable diligence." The witness says: "After I received the policy from the National Marine Insurance Company, I took the policy of the Germania Insurance Company and brought both policies together to the Germania Insurance Company. There I found Mr. Michel, the president of the Germania Insurance Company. I said to him here is a policy which I have effected for \$5000 more in the National Marine. I said that in German, distinctly, and handed him both policies there. After he looked at them and read the policies then he said in German: "It is not necessary except in case of fire to send us notice." In answer to the question what was done with the

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policies? The witness replied: "He returned them to me." Now on the other hand Michel, the president of the Germania Bank as a witness gave answers to the questions propounded to him as follows: State when you were first informed of the insurance in the National Marine and Fire Insurance Company effected by these plaintiffs on the stock of goods in that same store? Answer—"After receiving their notice, giving notice of the fire." This notice in evidence, has date May 30, 1867, the morning after the fire. Will you please tell us if prior to that time Mr. Gustave Winehill ever called upon you to notify you of that subsequent insurance? Answer—"No." Did you ever converse with him in regard to any subsequent insurance effected by him or his firm on the stock of goods in that store? Answer—"No." Mr. Gustave Winehill has testified he had notified you verbally of that, and that you told him it was all right. Answer—"No, it is not true." You say that it is not true? Answer—"It is not." You are very positive he never called upon you on that subject prior to the fire? Answer—"I am; he never did."

Testimony of the conflicting character of that of these two witnesses should, at least, *ceteris paribus*, neutralize itself and go for nothing.

The testimony of Gustave Winehill does not pretend to fix any specific time when he went with the two policies to the president of the Germania. His counsel put no question to him to elicit the precise time at which he went to the Germania Bank to show these policies. The expression "after" I received the policy from the National Marine Insurance Company, I took the policy of the Germania Insurance Company and brought both policies together to the Germania Insurance Company, left him a large margin as to the time when he carried the policies. It may have been one day, one week, or one year after. "An express condition to prevent a forfeiture of the policy in such a case is that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing." This plaintiff does not pretend that he required the president of the Germania to indorse such notice on the back of the policy or to acknowledge it in any other way. The propriety of such a clause in a policy of insurance is, perhaps, apparent in this case. Its purpose is to enable the insurance company to protect itself, and as well to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on the property insured by them.

The testimony of the other witness, Morris Winehill, a brother of one of the plaintiffs, is, for the most part, hearsay, and of no weight whatever.

It was doubtless the conclusion of the judge *a quo* after admitting

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parol testimony in this case, and seeing its want of force, that judgment should be rendered for the defendants.

We think it is clearly shown by many authorities that the rule which excludes parol evidence in such cases is well settled, and strictly adhered to. See 23 An. 332; 3 Rob. 385; 7 Rob. 351; 16 Peters 510.

It is therefore ordered that the judgment of the district court be affirmed with costs.

MORGAN, J. Plaintiffs insured their property in the Germania Insurance Company. Their policy expressly stipulates that "if the said insured or their assigns shall hereafter make any insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." They effected insurance in another company, and did not cause the same to be indorsed on the Germania policy. Now, this was the contract between the parties, and it was absolutely binding upon them. If it was not complied with, the result is that the insurance was forfeited. It was not complied with. Plaintiffs, therefore, have no right to recover.

There is the testimony of one of the plaintiffs and his brother, that the defendants were notified of the subsequent insurance, and that they said "it was all right." This is denied by them. It was, possibly, to avoid the chance of any such conflict of testimony that the company insisted upon the clause in the policy which has been quoted. It may be true that the company were notified of the subsequent insurance, but it was not notice alone which they stipulated should be given; it was agreed that the notice should be indorsed on the policy.

Certainly, a case might arise where the want of the indorsement would not be fatal to the insured. As for instance, if it were established that the insured had given the notice and had demanded that the indorsement be made on his policy, and the proper officer of the company had refused. In such a case the company could not shield itself for a neglect to perform its obligation. But the assured should make this refusal clear, as for instance, by putting the company in default.

I therefore concur in the decree.

Mr. Justice Wyly concurs in this opinion.

HOWELL, J. In my opinion the presentation of the second policy of insurance was written notice of the highest character of such insurance, and if there was no indorsement thereof on the policy or other written evidence that such notice had been given, it is not the fault of the insured. He did his duty, and being informed by the president of the company that it was all right, and to give notice in case of loss, he had a right to rely on such action.

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To hold otherwise is simply to say, in my opinion, that the statement of the plaintiff and his brother is not believed.

I find nothing in the record to impeach their veracity beyond the denial of the president of the defendant company. They speak affirmatively and positively.

I therefore think the plaintiffs should recover.

Rehearing refused.

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No. 4440.

ELIAS GEORGE *v.* A. G. TUCKER AND B. F. TAYLOR.

The State *ex rel.* Elias George instituted suit against Tucker, under the intrusion act, to recover the office of recorder of the parish of Tangipahoa. Whilst that suit was pending, George sued Tucker and enjoined him from recovering the fees of the office. The injunction was set aside on Tucker giving a release bond with sureties. There was judgment against Tucker for the fees, George having been declared entitled to the office in the suit of the State *v.* Tucker. The plea set up by Taylor, surety on the release bond, that George could not sue for his fees of office without the interposition of the Attorney General or district attorney in his behalf, can not be maintained.

The State having instituted proceedings to oust the intruder from the office and to install George therein, there is no good reason why George should not have taken all necessary steps to preserve his rights to the fees of the office to which he had the legal title. The State was interested in seeing that no one should intrude into a public office, but it had no interest in the fees of the office.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. B. Edwards* and *G. W. H. Marr*, for plaintiff and appellee. *T. & J. Ellis*, for B. F. Taylor, defendant and appellant. *William Duncan*, for Tucker, defendant and appellant.

LUDELING, C. J. In March, 1870, the State *ex rel.* Elias George instituted suit against Tucker, under the intrusion act of 1868, to recover the office of recorder of the parish of Tangipahoa.

This suit was decided in favor of George. See 23 An. 139.

While that suit was pending, George sued Tucker and enjoined him from receiving the fees of the office during the pendency of the suit. The injunction was set aside by Tucker giving a release bond, with Taylor and two others as sureties.

On the trial of the suit between George and Tucker, there was judgment in favor of George for the fees received by him, etc. Taylor, alleging an interest in this judgment, has appealed. Tucker has not appealed.

He says that the injunction was unauthorized by law; that the proceedings under it are void; that the bond setting aside the injunction is not binding. And in support of his positions he cites *Terry v. Stauffer*, 17 An. 306; *Voisin et als. v. Leche et als.*, 23 An. 25; 23 An. 61.

These cases do not support the positions for which they are cited.

George v. Tucker and Taylor.

He further contends that George could not sue for his fees of office without the interposition of the Attorney General or district attorney in his behalf.

The State having instituted proceedings to oust the intruder from the office and to install George therein, we can perceive no good reason why George could not take all necessary steps to preserve his rights to the fees of the office to which he had the legal title. The State was interested in seeing that no one should intrude into a public office, but it had no interest in the fees of the office.

It is therefore ordered that the judgment be affirmed with costs of appeal.

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No. 3509.

M. N. RADOVICH v. LOUIS FRIGERIO JR.

The defendant objected to this action on the ground that the petition disclosed a partnership, and between partners only an action for the settlement of the partnership will lie. The court *a qua* erred in overruling the exception. The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer *Ella May*. The objection to the form of the action should have been maintained.

A PPEAL from the Seventh District Court parish of Orleans. *Collens, J. Fergus Fuselier, B. Egan*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

ON MOTION TO DISMISS

WYLY, J. It is the duty of the appellant to bring up a correct transcript. If the record which he files does not contain all the evidence, it is his duty to apply for a *certiorari* to correct it before the case is submitted on the merits.

In the case at bar the appellee moved to dismiss the appeal on the ground that the record does not contain all the evidence adduced at the trial below.

The case was submitted on this motion and also on the merits, without any application being made by the appellant to correct the record according to law. The fault is attributable to the appellant. It is, therefore, ordered that the appeal herein be dismissed at appellants costs.

ON REHEARING.

On further examination we find that we erred in dismissing this appeal for diminution of the record, because the document supposed to be missing is in the record, being the account annexed to the petition,

Radovich v. Frigerio, Jr.

which probably by mistake was not marked "C." The identity of the document is sufficiently disclosed in the testimony of one of the witnesses, notwithstanding it was not marked "C" as stated. The motion to dismiss is therefore denied.

ON THE MERITS.

The plaintiff alleges that on the twentieth of February, 1869, he entered into a verbal contract with the defendant, the owner of the steamer "Ella May," then lying near Madisonville in the parish of St. Tammany, by which petitioner was to superintend her repairs and fitting up and was to advance money for that purpose, to bring her round to the Mississippi river and run her in the lower coast trade; that petitioner was to act as captain and pilot of the boat and receive \$250 per month for his services; also one-half of the net earnings of the boat and all advances made by petitioner for or on account of the boat were to be reimbursed to petitioner by the said Louis Frigerio Jr. Petitioner further represents that in compliance with said agreement he went to and took possession of said boat on twentieth February, 1869, brought her to the city, superintended her repairs, and after they were completed, ran her in the lower coast trade carrying freight and passengers for hire until seventeenth July, 1869, when he was, without cause, removed from command of said boat by Louis Frigerio jr., etc. Further alleging that the defendant was about to dispose of the boat for the purpose of defrauding him, the petitioner prayed for an attachment thereof and for judgment for \$3163 23 the value of repairs and wages alleged to be due him, and also for one-half the net earnings of said boat from the twentieth February, 1869, until seventeenth July, 1869, and costs.

The defendant excepted to the action on the ground that the petition disclosed a partnership, and between partners only an action for settlement of the partnership will lie.

The court overruled this exception, and the defendant, reserving the benefit thereof, answered to the merits. At the trial there was judgment for plaintiff for \$2623 43 and the defendant appealed.

The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer "Ella May." The objection urged to the form of the action should have been maintained.

It is therefore ordered that the judgment appealed from be annulled and that this suit be dismissed without prejudice to plaintiff asserting his demand in a proper form, plaintiff paying costs in both courts.

Rehearing refused.

Brugere v. The Heirs of Slidell.

No. 5474. ✓

JOSEPH BRUGERE v. THE HEIRS OF JOHN SLIDELL.

Plaintiff was the owner of the property on which he made certain improvements, repairs, etc., for the reimbursement of the value of which he now sues. It is true that this ownership existed only during the lifetime of John Slidell, from whom it had been taken by forfeiture and confiscation. Still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted, he could no longer set up possession in good faith.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Kennard, Howe & Prentiss*, for plaintiff and appellee. *Clarke, Bayne & Renshaw*, for defendants and appellants.

MORGAN, J. The United States, under a decree of forfeiture, sold the property of John Slidell. Joseph Brugere became the purchaser of a piece thereof.

On the death of Slidell his heirs instituted suit against Brugere to recover this property. They succeeded.

Brugere brings this suit to recover from the heirs the value of improvements, repairs, etc., which he put upon the property while it was in his possession.

He can not succeed. He was the owner of the property when the improvements, etc., were made. It is true this ownership existed only during the lifetime of Slidell; still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted he could no longer set up possession in good faith.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

Rehearing refused.

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No. 5384.

HENRY J. SORRELL v. VICTOR LAURENT.

A suit instituted in a court without jurisdiction interrupts prescription.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Hornor & Benedict*, for plaintiff and appellant. *S. P. Blanc*, for defendant and appellee.

MORGAN, J. This is a suit on a promissory note for \$563 30, dated

Sorrell v. Laurent.¹

New Orleans, December 22, 1866, and payable four months after date. Citation issued on the fifth of May, 1874. The petition was served on the sixth of May, 1874.

The defense is prescription.

On the nineteenth of April, 1867, a few days before the maturity of the note, the defendant wrote to the attorneys of plaintiff, who held the note: "It is impossible for me to pay my note to you before at least ninety days from and after May, 1867. I will be able to pay my note on the first of August next, and not before."

This was an acknowledgment of the debt, and prescription commenced to run from that date.

Suit was brought on this note in the Seventh District Court, on the third of May, 1872, and citation was served on the defendant on the seventh of May, 1872. A default was rendered, which was confirmed. From this judgment a suspensive appeal was taken. The judgment was reversed and the suit dismissed, on the ground that the court was without jurisdiction.

But a suit instituted in a court without jurisdiction interrupts prescription, and prescription was not again acquired before the institution of this suit.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the plaintiff, as claimed in his petition, with costs in both courts.

Rehearing refused.

No. 5213.

STATE OF LOUISIANA EX REL. THE CRESCENT CITY WATER WORKS COMPANY v. P. G. DESLONDE, SECRETARY OF STATE.

Courts have no power to promulgate laws and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and none within those of the judicial.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. John Ray, Rice & Whitaker*, for relator and appellant. *A. P. Field*, Attorney General, for defendant and appellee.

TALIAFERRO, J. An application was made on the part of the relators to the judge of the Superior District Court for a writ of mandamus directed to the defendant, the Secretary of State, commanding him to promulgate as a law of the State by publishing in the official journal of the State an act which the relators allege was passed by the Legis-

State ex rel. Crescent City Water Works Company v. Dealonde, Secretary of State.

lature of the State at the session which commenced on the first Monday of January, 1871, the act being entitled "an act to incorporate the Crescent City Water Works, etc." Upon a rule to show cause, the defendant, through the Attorney General answered, that there is not in the office of the Secretary of State any act incorporating "The Company of the Crescent City Water Works" as set forth in the petition of the relators, and that there has not been since he came into office as Secretary of State. The rule was dismissed and the relators have appealed.

We find from the evidence in the record that a bill passed both houses of the Legislature at its session beginning first Monday of January, 1871, bearing the title set forth by the relators, that it was duly enrolled and presented to the Governor; that it failed to receive his approval; that afterwards, during the month of April, after the adjournment of the Legislature, at the solicitation of parties interested, the Speaker of the House of Representatives and the Lieutenant Governor caused to be made a duplicate enrolled bill from the engrossed bill in the hands of the clerk of the House of Representatives; that this duplicate copy was signed by them and certified to be a law by the Secretary of State in the usual manner when bills are not returned by the Governor to the Secretary of State within the time prescribed by the Constitution; that a certified copy of this duplicate enrolled bill was sent to the State printer for publication, which he refused to publish. The duplicate enrolled bill, it seems, is not now to be found in the office of the Secretary of State. At the next session of the Legislature the Governor transmitted to the House of Representatives a message on the twenty-third of January, 1872, vetoing the bill, but the bill itself was not returned with the message and it has not yet been found, so that both the original enrolled bill and the duplicate of it made from the engrossed bill are lost. A clerk who was engaged in the office of the Secretary of State in 1871 and 1872, who was introduced as a witness, recognized the copy now extant of the duplicate enrolled bill as the same copy which he made from that duplicate about the twenty-fourth or twenty-fifth of August, 1871, to be sent to the State printer. He testifies that, after the bill was handed to the Secretary of State, the private secretary of the Lieutenant Governor came in and requested the name of Oscar J. Dunn, Lieutenant Governor, to be erased from the bill, as the Lieutenant Governor did not care to have his name in the bill. The private secretary, making this request, claimed to be acting under directions of Governor Dunn. The witness states that the name was erased a day or two after he made the copy. The original bill presented to the Governor could not have become a part of the records of the office of the Secretary of State except it had passed through the

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hands of the Clerk of the House of Representatives with his certificate that the bill had passed over the Governor's veto.

No such record is found in the Secretary's office or elsewhere. The original bill duly certified by the Clerk of the House of Representatives and of record in the Secretary of State's office would constitute the best evidence that the act of the Legislature in question had become a law. As it is, its authenticity and condition to become a law is a matter of grave doubt.

But courts have no power to promulgate laws and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those by the constitution authorized to enact and promulgate laws, the corrective is to be sought within the powers of the legislative and executive departments, not within those of the judicial.

The order of the lower court refusing the mandamus was properly rendered.

Judgment affirmed.

Rehearing refused.

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No. 3881.

M. A. DOCKHAM AND HUSBAND v. JONATHAN POTTER.

This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgement as attorney in fact for the plaintiff, at the time he did so.

But the judgment complained of was rendered also on the written consent of Frank Haynes her attorney. His authority to consent to the judgment with a stay of execution until a certain specified time has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it.

The attorney was a sworn officer bound by his oath to act correctly in the pursuits of his profession. Thus situated, it is not to be presumed that he acted without proper authority. On the contrary, every presumption is in favor of his having pursued the proper course of conduct, unless the contrary should be suggested on affidavit.

In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict, T. A. Bartlette, G. Schmidt, W. B. Lancaster*, for plaintiff and appellee. *Roselius & Philips, Kennard, Howe & Prentiss*, for defendant and appellant.

WILY, J. On the seventeenth May, 1866, Mrs. Josephine Lacoste sued out an order of seizure and sale on the mortgage note of the plaintiff for \$3000, which was subsequently changed to a proceeding *via ordi-*

naia. On the twenty-second June, 1866, judgment was rendered for the amount of the note with recognition of the mortgage and with stay of execution until the first November, 1866, on the confession of judgment signed by P. S. Nugent, the father of plaintiff, as her attorney in fact, and also on the written consent signed by Frank Haynes attorney for defendants.

After the stay of execution had elapsed and the further delay caused by an injunction, which was dissolved, the mortgaged property was sold to the defendant who had previously become the owner of the judgment and regularly subrogated to the rights of the plaintiff therein.

The plaintiff now sues to annul the judgment, set aside the sale thereunder and to recover the property, on the ground that said judgment and sale are "absolutely null and void for the following causes specially:"

First—That the petitioner was at the time as now, a married woman, residing in the State of California; that she had no legal representative in Louisiana and "no one legally authorized to represent her in court or bind her in the course of any litigation, compromise or consent;" that she was not cited; "that she has never been authorized or assisted in said suit or any of the aforesaid proceedings by her said husband nor by order of court."

Second—That the advertisement under which the property was sold was materially erroneous in that it described lot No. 1, as having a front of thirty-four feet two inches, instead of forty-four feet two inches, by means whereof, or otherwise, the appraisers were misled into appraising the property at not half its value.

The court gave judgment for plaintiff and the defendant appealed.

The marriage of the plaintiff previous to the suit, vacated the authority conferred in the contract of mandate executed before marriage to her father P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff. But the judgment complained of was rendered also on the written consent of Frank Haynes, attorney for defendants. His authority to consent to the judgment on the mortgage note with a stay of execution until the following November, has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it. "He, the attorney, was a sworn officer, bound by his oath as well as by the principles of integrity and honor which ought to characterize the profession of which he was a member, to act correctly in its pursuits. Thus situated, it is not to be presumed, that he acted in the present case without proper authority. On the contrary, every presumption is in favor of his having pursued a proper course of conduct, unless the contrary should

 Dockham and Husband v. Potter.

be suggested by the opposite party on affidavit. It is true that an attorney of court may be deceived by the conduct of others, so as to undertake to represent a person, from whom there is no authority to that effect, and on a suggestion of an error of this kind upon affidavit, it would become the duty of the court to ascertain the truth." *Hays v. Cuny*, 9 M. 88. And this has been the uniform doctrine of this court since that decision. 10 M. 639; 8 N. S. 233; 4 Rob. 23; 12 Rob. 95; 1 An. 398; 3 An. 558; 5 An. 118; 10 An. 67; 24 An. 233.

That an attorney at law who consents to a judgment, as was done by Haynes in this case, is presumed to have authority to do so, was expressly decided in the case of *Dangerfield v. Thurston's heirs*, 8 N. S. 235, and nothing to the contrary has ever been held by this court. If the plaintiff desired this court to notice the suggestion that the attorney at law who consented to the judgment now complained of, in her behalf, had no authority to do so from herself and her husband, she should have alleged the fact under oath, which has not been done.

In regard to the error in the advertisement in regard to the exact number of feet the property fronted on the street, we will remark that it is an irregularity which ought not to vitiate the sale. The proceedings appear to be regular.

It is therefore ordered that the judgment herein in favor of plaintiff be annulled and it is now decreed that there be judgment for the defendant rejecting this demand at plaintiff's costs in both courts.

Rehearing refused.

 No. 4436.

RHODA E. WHITE v. MYRA CLARKE GAINES.

The answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. DeGray, Semmes & Mott*, for plaintiff and appellee. *Fellows & Mills*, for defendant and appellant.

MORGAN, J. From a judgment rendered against her the defendant took a suspensive appeal returnable to this court on the first Monday of November, 1872.

The sufficiency of the security on the appeal bond was tested, and the district judge decided in favor of the bond.

The transcript of appeal was filed here. To the appeal the plaintiff answered, claiming an amendment of the judgment in her favor.

Subsequently plaintiff moved the district judge to order the defendant

to furnish additional security, alleging that the surety on the bond first given had become insolvent. The motion was granted, and the delay in which the additional security was to be given was fixed at ten days. After the ten days had elapsed, defendant, under an application to us for a writ of prohibition, sought to have the judgment of the district court, which decided adversely to the solvency of her surety, corrected. This we declined.

The additional bond ordered by the judge was furnished.

On the sixth November, 1874, motion was filed to dismiss the appeal.

On the eleventh November, plaintiff filed a supplemental and amended answer to the appeal.

In our opinion the answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss. *Hoffman v. Atkins*, 11 An. 172; 13 An. 433.

ON THE MERITS.

The object of this suit is to enforce a contract entered into between the parties and one John Mack, whose interest is now in plaintiff, entered into on the thirtieth May, 1864, by which the defendant agreed to pay to plaintiffs fifteen dollars out of every one hundred dollars which might be realized out of the estate of the defendant's father.

The defense is that the agreement was without consideration, and was obtained through fraud.

No one can read the voluminous testimony to be found in this record without, in our opinion, being satisfied,

First—That the defendant knew precisely what she was doing when she signed the contract sued upon.

Second—That it was intended to be, and was, a compromise of the claims which the plaintiff asserted he had against her.

Third—That neither error, force, threats or fraud was practiced upon or against her in order to obtain her consent thereto.

Fourth—That it was entered into by her upon the advice of the counsel to whom she had submitted the protection of her interests, and who was informed of all the circumstances from herself, and under whose supervision, if not by whose hand, the instrument was drawn.

Fifth—That months after the compromise was entered into, she acknowledged having executed it, and declared that she did not wish to retract the same.

Under these circumstances, the defense has none of the elements out of which the right to repudiate the contract can be framed.

It is ordered that the judgment of the district court be amended to read as follows:

 White v. Gaines.

It is ordered adjudged and decreed, that there be judgment in favor of plaintiff, Mrs. Rhoda E. White, and against the defendant, Myra Clarke Gaines, for the sum of thirty thousand dollars, with interest at the rate of seven per cent. from May 30, 1865, until paid, with mortgage on the property described in the agreement and act of mortgage, dated May 30, 1864, and recorded in the mortgage office for the parish of Orleans, in Book 80 of mortgages, folios 140, 141, and 142, and annexed to plaintiffs petition and made part thereof, with the right to take out execution for the sum of twenty thousand, one hundred and five dollars and twenty cents, being fifteen per cent. of the amount of money and property which is proven to have been recovered, collected and realized by the defendant since May 30, 1864, as heir, daughter and devisee of Daniel Clarke, deceased, reserving to the plaintiff the right to take out execution from time to time for fifteen dollars out of each and every one hundred dollars that may hereafter be recovered, collected or realized, by the defendant, or which she may heretofore have recovered, collected or realized, and of which no proof has been made, upon proof of said recovery being given and produced of, from or out of the property and estate formerly of the said Daniel Clarke, deceased, until the amount recovered from the defendant by the plaintiff shall amount to the sum of thirty thousand dollars, with interest at the rate of seven per cent. from May 30, 1865, until paid.

It is further ordered that the property in said mortgage described be sold to satisfy the foregoing judgment, and that defendant pay all costs of suit.

It is further ordered that as amended said judgment be affirmed, costs to be paid by the defendant.

Rehearing refused.

 No. 4034.

COHEN & WILSON v. WILLIAM GOLDING AND FRANCOIS LACROIX.

This suit is brought against the sureties of a late sheriff to recover the amount of a judgment rendered against him. The main defense is the prescription of two years, pleaded under section 3546, of the Revised Statutes.

It is true that the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, the sheriff, was, and this interrupted prescription as to them.

Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for plaintiffs and appellees. *Rice & Whitaker, M. E. Livaudais*, for defendants and appellants.

WYLY, J. The defendants, the sureties of George W. Avery, late sheriff of the parish of Orleans, appeal from the judgment against them for \$941 85, the amount of a judgment against their principal for illegally releasing the seizure, pending an injunction, in the case of these plaintiffs v. Joseph Canall, No. 18,768 on the docket of the Fifth District Court.

The seizure was released on twenty-fifth June, 1868, and within two years thereafter, to wit: On twentieth June, 1870, suit was brought against Avery for the damages resulting therefrom; and there was judgment against him on twenty-fourth January, 1871, for \$941 85. Failing to make the money on execution against Avery this suit has been brought for the amount thereof against the defendants, the sureties on his official bond.

The main defense is the prescription of two years pleaded under section 3546 of the Revised Statutes, which declares that: "The sheriffs and their securities shall be able to prescribe against their acts of misfeasance, nonfeasance, costs, offenses, and *quasi* offenses, after the lapse of two years from the day of the omission or commission of the act complained of."

It is true the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, Avery, the sheriff, was, and this interrupted prescription as to them.

Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal. *Mellen v. Scott*, 9 An. 174; *Ferguson v. Glaze*, 12 An. 687; 2 An. 916, 970; 5 An. 551; 14 An. 144; Revised Code, 2097, 3553.

Judgment affirmed.

MORGAN, J., *dissenting*. Plaintiffs obtained a judgment on the twenty-fourth January, 1871, against Avery, late sheriff, and one Mora, *in solido*, for \$941 85. The ground of the action arose out of certain alleged tortious and illegal acts of Avery and his deputies. The *fiery facias* issued on that judgment was returned *nulla bona*. The object of this suit is to recover the amount of that judgment from the defendants, who were sureties on Avery's official bond.

They plead the prescription of two years.

This suit was instituted on the seventh October, 1872.

The illegal act complained of in the suit against Avery and Mora was done on the twenty-fifth June, 1870.

Section 3546 of the Revised Statutes provides that, "Sheriffs and their securities shall be able to prescribe against their acts of misfeasance, nonfeasance, costs, offenses and *quasi* offenses, after the lapse of two years from the day of the omission or commission of the act complained of."

The act complained of was committed more than two years before this suit was instituted. The proceedings against Avery, which resulted in a judgment against him, interrupted prescription as to him, but has no effect upon the defendants, his sureties, who were not parties to that suit.

I therefore dissent from the opinion just rendered.

✓
No. 5403.

POWHATAN WOOLDRIDGE, JOSEPH A. CIRE, Subrogated v. E. MONTEUSE, M. S. HEDRICK, Intervenor.

Cire, the subrogee of Powhatan Wooldridge to a judgment obtained by the same v. E. Monteuse—which judgment was transferred from P. Wooldridge to E. Wooldridge, and by E. Wooldridge to Cire, caused a *fi. fa.* to issue in said judgment. Hedrick, the intervenor, took a rule against him to quash the writ, on the ground that he, the intervenor, was the real owner of the judgment, seized in the suit of Hedrick v. E. Wooldridge, and purchased by him at sheriff's sale. Hedrick had proceeded by attachment against E. Wooldridge, absentee. In this attachment case several citations were made, but it seems that in every instance the returns of the sheriff were simply that service of petition and citation was made on the curator *ad hoc* in person, mentioning the name of the curator. It appears from the returns of the sheriff, that in neither of the instances were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return.

A court can presume nothing with regard to a party being cited.

The failure to serve the proper citation is fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. Therefore the rule was properly discharged.

Subsequently to a decision of the lower court, that the order granted for a suspensive appeal on the part of the intervenor, plaintiff in the rule, did not suspend execution on the *fi. fa.*, said intervenor filed a petition of third opposition and prayed for an injunction which was issued. To this proceeding an exception was filed, on the allegation that the grounds of action of the rule and of the petition for injunction were the same, and that the pendency of appeal on the rule supported the plea of *lis pendens* which was presented. This exception was properly maintained by the judge *a quo*.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Henry B. Kelly*, for plaintiff and appellee. *E. Howard McCaleb*, for intervenor and appellant.

TALIAFERRO, J. There are two appeals in this case growing out of a contest between the plaintiff, or rather his subrogee, J. A. Cire, and the intervenor, for the ownership of a judgment obtained by Powhatan Wooldridge against the defendant, E. Monteuse. In both proceedings Cire was successful. The intervenor has appealed from both judgments. Cire having caused a *fi. fa.* to issue on the judgment against Monteuse, Hedrick, the intervenor, took a rule against him to show cause why the writ should not be quashed, on the ground that he, the intervenor, and not Cire, was the real owner of the judgment against Monteuse. The intervenor claims title by virtue of an alleged purchase by him of the judgment at a sheriff's sale, made under *fi. fa.*

in the suit of M. S. Hedrick v. E. Wooldridge, No. 42,345 of the docket of the Fourth District Court of New Orleans. It appears that Powhatan Wooldridge transferred the judgment he obtained against Montense to Edmund Wooldridge, a resident of the State of Kentucky, and that Edmund Wooldridge, by his agent, E. R. Hogan, transferred it to Cire. Hedrick having claims against Edmund Wooldridge instituted proceedings against him as an absentee, by attaching the judgment against Montense as the property of his debtor, and having a curator *ad hoc* appointed to represent him. Obtaining judgment in this suit he caused execution to issue, and the judgment to be seized and sold, and at the sheriff's sale became the purchaser. The averments of the rule on Cire not only assert title in Hedrick but attack that of Cire, on the alleged grounds that E. R. Hogan, by whom, as agent of Edmund Wooldridge, the transfer and assignment to Cire was executed, was without authority to execute it; that prior to service of notice of the transfer to Cire, on Montense, the judgment debtor, notice of attachment of the judgment had been served upon him, in the suit of Hedrick v. Edmund Wooldridge, in the Fourth District Court; that Cire gave no consideration for the transfer, and that it was simulated and fraudulent; that at the time of the transfer Edmund Wooldridge was insolvent, was a resident of Kentucky, and that the judgment in this case was the only property he had in this State, and that therefore the judgment to Cire was of no avail, even if made to pay an existing debt.

In answer to the rule Cire sets forth—

First—That the alleged judgment, execution and sheriff's sale under which Hedrick claims title are all absolute nullities, for the reason that it appears on the face of the proceedings in the suit No. 42,345, of the Fourth District Court, and of the sheriff's returns therein, that no service of either citation or attachment was ever made on Edmund Wooldridge, he being absent from the State as alleged in the petition and affidavit, and no copy either of the citation or of the attachment was ever posted, as required by law, at the door of the room where the court was held.

Second—That the court was without jurisdiction of the cause, and its judgment a nullity, not only by reason of the want of service of the attachment or the citation, but for the further reason that it does not appear from the return of the sheriff on the writ of attachment, or otherwise, in said suit in the Fourth District Court, that any property, right or credit of Edmund Wooldridge was ever levied upon under said writ.

Third—That prior to the pretended levy under said writ, all the right of Edmund Wooldridge in and to the judgment of Powhatan

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Wooldridge against E. Montouse, had been transferred to Cire; that E. R. Hogan, by whom, as agent of Edmund Wooldridge, the assignment was executed, was fully empowered to execute it; that the consideration of the assignment was money actually loaned or deposited with Edmund Wooldridge, amounting in principal to \$1200, and together with interest to the date of assignment to about \$1431; that the whole transaction was in perfect good faith, and all the averments in the rule of fraud, collusion and want of consideration, false in every particular.

Fourth—That if the averments of the rule were true, instead of being false, they would not entitle the plaintiff in rule, by summary proceeding of that character and without affidavit and bond, to correct the execution of a *fi. fa.*

Fifth—That the assignment from Edmund Wooldridge to Cire can not be attacked by allegations of the insolvency of Wooldridge, of fraud and collusion, in a summary proceeding by rule, but only in a regular revocatory action.

Upon a trial of the rule, evidence at large was gone into by both parties on the merits of their respective titles.

We are of the opinion, from an examination of the evidence, that the consideration of the transfer of the judgment from Edmund Wooldridge to Cire, was money owing to the latter by Wooldridge. The power of Hogan, the attorney in fact, to make the transfer is ample. As a witness, he testifies that prior to his transfer of the judgment he had not received notice of Hedrick's seizure of it.

The objections to the title of the intervenor are of a graver character. Wooldridge being an absentee, he could only bring him before the courts of this State by attaching his property within the State. The mode of citation in such cases is marked out by the 254th article of the Code of Practice. "If, on the contrary, the defendant has no known place of residence, conceal his person, be absent, or reside out of the State, in such case the sheriff shall serve the attachment and citation by affixing copies of the same on the door of the room where the court in which the suit is pending is held."

In this case there was four citations and returns made. The curator *ad hoc* first appointed having died pending the suit, another was appointed. The first citation was issued on the twentieth of May, 1873. The sheriff's return recites "that after search and inquiry I was unable to find E. Wooldridge, or any one to represent him, and I am credibly informed he resides out of the State. Returned same day." The other citations were served upon curators *ad hoc*. The returns in each of these cases are simply that service of the petition and citation were made on the *curator ad hoc in person*, mentioning the name of the

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curator. It appears from the returns of the sheriff that in neither of the cases were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held. Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. 21 An. 26. A court can presume nothing with regard to a party being cited. 5 N. S. 429; 1 Rob. 30; 13 An. 374. In the case of *Patterson v. R. R. Coy*, 3 R. 232, the court said: "We have repeatedly held that the formalities prescribed by article 254 of the Code of Practice stand in lieu of citation, and that they form the basis on which all subsequent proceedings in the case must rest, and that their omission was a radical defect which rendered null and void all that had been done in the case after the filing of the petition." Also to the same effect are the cases 9 An. 552; 23 An. 772; 24 An. 512.

We must regard the failure to serve the proper citation as fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. The judgment of the lower court discharging the rule, we think, was properly rendered. Subsequently to the taking of an order for a suspensive appeal, on the part of the intervenor, it was decided by the court below that the appeal did not suspend execution on the *fi. fa.* The intervenor then filed a petition of third opposition praying for an injunction. Upon this petition, affidavit being made and bond given, an injunction was issued. Cire, thereupon, excepted to the proceeding on the ground that the petition on its face does not allege a state of facts, which if true, would entitle Hedrick to proceed against Cire by way of third opposition in this suit; that all the causes of action averred in the petition were before averred in the rule; that Cire joined issue upon all of them, and moreover averred in his answer, among other grounds of defense, the nullity of the judgment in the suit No. 42,345 of the Fourth District Court, then set up in the rule, and now again set up in the petition, as the source of Hedrick's title; that upon all these issues trial was had, and judgment rendered declaring the nullity of the judgment set up by Hedrick; that from the judgment discharging the rule Hedrick has taken an appeal, which is still pending; that the grounds of action of the rule and of the petition are the same, and the pendency of appeal supports the plea of *lis pendens*, which is pleaded; and if Hedrick elects to abandon the appeal, then the judgment discharging the rule will support the plea of *res judicata*, which may be interposed at any time. The judgment on the third opposition maintained the exception and dismissed the opposition with costs.

We think the decree of the lower court was properly rendered.

Judgment affirmed.

Rehearing refused.

Letorey v. Forstall et als.

No. 3660. ✓

JEAN B. LETOREY v. EDMOND J. FORSTALL et als.

This is a suit brought against defendants and various other persons named in the petition, who, as the plaintiff alleges, composed a partnership entered into for the purpose of purchasing and owning the Mississippi Cotton Press and the Branch Press, forming part of the same, which property was bought by Felix J. Forstall, now deceased, but then one of the copartners, acting as the representative of said copartnership and using his name as a firm name to represent the same.

The notarial act by which the plaintiff conveyed title to the property, shows simply that the plaintiff sold to Felix J. Forstall. There is nothing that shows privity between the plaintiff and these defendants. If between Felix J. Forstall and the defendants there existed an agreement by which the property was to be paid for and owned in common by them, the plaintiff shows nothing authorizing the conclusion that he considered the defendants bound to pay him any thing on this contract. He seems by the terms of the sale to have looked only to Felix J. Forstall, and the mortgage and vendor's privilege upon the property sold. The act of sale contains nothing that warrants the belief that Felix J. Forstall acted as an agent for any person.

A PPEAL from the Seventh District Court, parish of Orleans. *Colems J. Semmes & Mott, G. Schmidt*, for plaintiff and appellee. *O. Roselius & A. Philips, William H. Hunt, Saucier & Michinard, Alfred Grima*, for defendants and appellants.

TALIAFERRO, J. This suit is brought against the defendant and various other persons named in the petition, who, as the plaintiff alleges, composed a partnership, entered into for the purpose of purchasing and owning the property known as the Mississippi Cotton Press and the Branch Press, forming part of the same; that Felix J. Forstall, now deceased, one of the copartners acting as the representative of said copartnership, and using his name as a firm name to represent said partnership, did on the first of November, 1859, purchase from the plaintiff the said press and property for the sum and price of one hundred and thirty-two thousand dollars; that this copartnership, through the management and in the name of the said Felix J. Forstall, paid up from time to time portions of the price of said property, leaving due and unpaid on the twenty-ninth of April, 1868, thirty-eight thousand nine hundred and thirty-three dollars and eighty cents, for which sum with eight per cent. interest thereon from the twenty-ninth of April, 1868, this suit is brought.

The defendants filed separate answers, all pleading the general issue. Judgment was rendered against the defendants each for his share of the debt. A remittitur was afterwards entered for a portion of the amount recovered. The defendants, unable to obtain a new trial, have appealed.

We are unable to conclude that the evidence establishes the copartnership which the plaintiff alleges. He annexes to his petition an instrument signed by the parties, which recites that "the undersigned agree to join in the purchase of the Mississippi Press to the extent of

the amount affixed to their names." This instrument is dated New Orleans, nineteenth of October, 1859, and against each signature is placed the amount each one is to contribute. This instrument does not show that the parties to it intended to purchase from the plaintiff, or that they had made or intended to make any contract with him. The plaintiff is not a party to the act.

The notarial act by which the plaintiff conveyed title to the property shows simply that the plaintiff sold "the Mississippi Cotton Press" to Felix J. Forstall for \$132,500, whereof \$20,000 were paid in cash, and for the remainder Felix J. Forstall executed four several promissory notes, dated on the first day of November, 1859, drawn payable to his own order, and indorsed by him, stipulating interest at six per cent. per annum from date until maturity, and eight per cent. per annum thereafter until paid. The first note was for \$15,250, made payable one year after date, and the other three respectively at two, three and four years after date, each for the sum of twenty-eight thousand two hundred and fifty dollars. The payment of these notes was specially secured by mortgage and vendor's privilege upon the property. There is nothing that shows privity between the plaintiff and these defendants. One of them testifying as a witness, says that he "never made any contract, either directly or indirectly, with the plaintiff; even now I don't know him; no contract of partnership was formed by us." If, between Felix J. Forstall and the defendants, there existed an agreement by which the property was to be paid for and owned in common by them, the plaintiff shows nothing authorizing the conclusion that he considered the defendants bound to pay him anything on this contract. He seems, by the terms of the sale, to have looked only to Felix J. Forstall and the mortgage and vendor's privilege upon this valuable property. The act of sale contains nothing that warrants the belief that Felix J. Forstall acted as an agent for any person. No power of attorney is shown authorizing him to bind others or to contract with the plaintiff in any manner.

The defendants plead against the notes the prescription of five years.

The view we take that the plaintiff has failed to show any contract between himself and the defendants renders it unnecessary for us to pass on the plea of prescription.

It is therefore ordered that the judgment appealed from be annulled and avoided. It is further ordered that there be judgment in favor of the defendants, the plaintiff paying costs in both courts.

HOWELL, J., *dissenting*. In my opinion the fact that the sale was made to Felix J. Forstall, does not debar the plaintiff from showing

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that the purchaser had partners who were, or became interested in the purchase.

I think there is sufficient evidence to show that the defendants were the partners of F. J. Forstall, and that judgment should be affirmed.

Rehearing refused.

No. 3897.

JAMES S. ROGERS v. ROBERT ROBERTS.

The plaintiff sues defendant for a certain sum of money on a contract of affreightment concerning the transportation of staves, for which he signed a bill of lading. After signing, he protested against it. This was too late. If his allegations are true, he should not have signed the bill of lading, or if he did, he should have protested at the time.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. Pitot, Horner & Benedict*, for plaintiff and appellant. *J. S. Tissot*, for defendant and appellee.

MORGAN, J. Plaintiff sues the defendant for \$1385 62 on a contract of affreightment.

The allegations are that he agreed to carry single claret staves for the defendant, the staves to be about one and a half inches thick, five inches wide, and from thirty-six to forty inches long, at fifty-eight dollars per thousand; that during his absence from his vessel, the defendant caused staves of much larger dimensions to be stored in the vessel, by which he was enabled to carry only 66,110 staves instead of 90,000, as he would have done in case the defendant had complied with his contract; that while the loading was going on he frequently remonstrated with him, and that he only permitted it to proceed after having been assured that it would be made all right.

Upon these questions of fact, plaintiff, and defendant, and their respective agents, all testified.

As usual, they contradict each other flatly. There is in the record the testimony of a witness in Bordeaux, who measured the staves as they were taken from the vessel, who says that they were one and six-eighths inches in thickness, but he does not give their length or breadth.

Now, the plaintiff signed a bill of lading for the staves. It is true he protested against it, but this was after it had been signed. If his allegations are true he should not have signed the bill of lading, or if he did he should have protested at the time of signing; at all events, he should have shown their incorrectness affirmatively.

The district judge gave a judgment of nonsuit. We can not say from the testimony before us that the plaintiff has made out his case.

Judgment affirmed.

Rehearing refused.

Golding v. Pettit.

No. 3557.

WILLIAM GOLDING v. JOHN PETIT.

The two sections 2125 and 2153 of the Revised Statutes must be construed together, and the section 2153, allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section 2125.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* Special jury trial. *R. H. Marr, C. Hunt, Clarke, Bayne & Renshaw*, for plaintiff and appellee. *Budd, Grover, and E. Bermudez*, for defendant and appellant.

WYLY, J. The defendant appeals from a judgment, on the verdict of a special jury, for \$1900 rendered against him for breach of contract made by him with the plaintiff, whereby he employed the latter in January, 1866, at the price of \$4200, to furnish an engine, repair two boilers, supply certain materials, and erect certain machinery to be used in a steam saw mill at the Bay of St. Louis.

The repairs were made and all the materials and machinery were delivered, except the engine, which was not delivered, because in violation of the contract the defendant failed to indicate the place of delivery, and to pay the installment of \$2100 due when the delivery should occur.

The first objection urged in this court is that the special jury was not composed of qualified voters and persons of the occupation or trade necessary for the proper decision of the case. It appears in the bills of exception taken by the defendant that two of the jurors were not registered voters, and one was not a citizen of the United States.

Section 2125 of the Revised Statutes declares that: "The qualifications of a juror to serve in any of the courts of this State shall be the following: To be a duly qualified elector, without regard to race, color, or previous condition, of the State of Louisiana."

Section 2153 provides that: "In the courts of the First Judicial District special juries may be directed to be summoned, whenever the judge shall be of opinion that the matters to be submitted to the decision of a jury are of such a nature as to require information peculiar to certain occupations or professions; in such case the judge is empowered, at the request of either party, to direct to be summoned a sufficient number of jurors of the occupation, profession, or trade necessary for the proper decision of the case."

The occupation of the jurors objected to, was such as to show they had sufficient information for a proper decision of the case, but not being qualified electors, under section 2125 of the Revised Statutes, they were not competent jurors in any of the courts of this State.

The two sections of the Revised Statutes quoted, must be construed

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together; and the section allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section, to wit, section 2125.

Finding that the case was not tried by a legal jury it becomes necessary to remand it for new trial.

It is therefore ordered that the judgment herein be set aside, and it is decreed that this cause be remanded for new trial, and to be proceeded in according to law and the views herein expressed, appellee paying cost of appeal.

No. 3652.

E. T. MERRICK, RACE & FOSTER v. EMILE LA HACHE—ST. LOUIS
PIANO MANUFACTURING COMPANY, Intervenors.

The effects of a third person equally with those of the lessee are, by article 2707 of the Civil Code, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy it would seem that the privilege would continue to attach like those of the lessee, and on the same conditions, for fifteen days after removal. But, by the well established rule that privileges are *stricti juris*, this court is precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons only on the conditions imposed in article 2707 of the Code, and to those conditions it is thought that the privilege must be restricted.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard*
J. E. T. Merrick, Race & Foster, personally. *Braughn & Buck*,
for defendant. *Randolph, Singleton & Browne*, for intervenors and
appellees.

TALIAFERRO, J. The plaintiffs leased to the defendant for the term of two years, commencing on the first of October, 1870, the storehouse No. 142, Canal street, New Orleans, at the rate of \$400 per month. After occupying the premises about a month the defendant abandoned the store and gave up business. The plaintiffs brought suit against him and took out a writ of provisional seizure, and caused to be seized by the sheriff a stock of merchandise in the store and three pianos which had been removed from the house within fifteen days from the time of the seizure; the pianos, however, were the property of the intervenors, who had placed them in charge of the defendant to be sold on commission on their account, and who intervened, claiming them as their property. Judgment was rendered against the defendant as prayed for, but in favor of the intervenors, and the plaintiffs have appealed.

[Merrick, Race & Foster v. La Hache—St. Louis Piano Manufacturing Co., Intervenor.]

La Hache, in May, 1870, was keeping a piano and music store in Baronne street. While there an agent of the intervenors engaged La Hache to sell pianos for them on commission, and within the course of a few months afterwards shipped to him seven pianos, which were placed in the store then occupied by La Hache, on Baronne street. When he removed to the store he had leased from the plaintiffs he carried with him the three pianos of the intervenors, which remained unsold on the first of October. Before they were provisionally seized by the plaintiffs they had been removed from the store of plaintiffs and deposited with A. E. Blackmar, a dealer in articles of that kind.

The plaintiffs claim the lessor's privilege on the pianos according to article 2707 of the Civil Code, which provides, "That this right of pledge affects not only the movables of the lessee and under lessee, but also those belonging to third persons when their goods are contained in the house or store, by their own consent, express or implied."

The intervenors allege that the pianos were not in the plaintiffs' store with their knowledge and consent; and that the pianos being goods consigned for sale on commission, and only transiently in the plaintiffs' store, the provisions of article 2708 of the Code protects them.

The proper inquiry appears to be in this case, are the movables of a third person which have been in the house or store of a lessor, and while there subject to his privilege, to be considered when removed, as being *in pari casu* with those of a lessee if seized by the lessor within fifteen days of the removal, provided the property continues to belong to the third person and can be identified? The article 2709 of the Civil Code is express on the subject, that in such a case the movables of a lessee may be seized, but is silent as to whether those of a third person may be seized after removal. The effects of a third person, equally with those of the lessee are, by article 2707, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy, it would seem, the privilege would continue to attach like those of the lessee, and on the same conditions for fifteen days after removal. But by the well established rule that privileges are *stricti juris*, we are precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons, only on the conditions expressed in article 2707 of the Code, and to those conditions we think the privilege must be restricted. Entertaining these views, we conclude the decree of the district court is correct.

Judgment affirmed.

Block, Britton & Co. v. Barton, Miller & Co., and Peet, Yale & Bowling v. The Same—Lewis & Co. and Clinton, Intervenor

No. 4738.

BLOCK, BRITTON & CO. v. BARTON, MILLER & CO., and PEET, YALE & BOWLING v. THE SAME—J. M. LEWIS & CO., and CHARLES CLINTON, Intervenor—Consolidated.

This court will, of its own motion, dismiss an appeal for want of pecuniary interest in the appellant.

This is a controversy between the creditors of Barton, Miller & Co., for a certain sum of money attached by plaintiffs in the possession of the Home Mutual Insurance Company. The fact that the president of the Home Mutual Insurance Company knew that the defendants, Barton, Miller & Co., had given J. M. Lewis & Co., intervenors in this case, an order or draft on their agent, Charles Clinton, which he agreed to pay out of the funds of the drawers when collected from the Home Mutual Insurance Company, did not divest the legal title of Barton, Miller & Co., in and to said funds, nor place them beyond the reach of their attaching creditors, the plaintiffs herein. If the Home Mutual Insurance Company had been the drawers [instead of Charles Clinton, the agent of the drawers, or if the funds had been attached in the hands of Charles Clinton, the case would have been different, and the authorities cited by counsel would have been applicable.

A PPEAL from the Sixth District Court parish of Orleans. *Saucier, J. Hyams & Jonas*, for Block, Britton & Co., plaintiffs and appellees. *Austin*, curator *ad hoc*, for defendants. *Semmes & Mott*, for Peet, Yale & Bowling, plaintiffs and appellees. *Clarke, Bayne & Renshaw*, for J. M. Lewis and Charles Clinton, intervenors.

WYLY, J. This is a controversy between the creditors of Barton Miller & Co. for the sum of \$43,692, attached in the possession of the Home Mutual Insurance Company, being the net amount of an adjusted loss incurred by said company on a policy of insurance issued to Charles Clinton for account of Barton, Miller & Co.

Block, Britton & Co. claim under an attachment for \$1048 42 levied on twenty-eighth March, 1872. Peet, Yale & Bowling claim under an attachment levied two days later for \$4222 76. J. M. Lewis & Co. found their claim on a draft of Barton, Miller & Co. for \$1478 93, drawn on Charles Clinton, dated March, 22, 1872, which Clinton promised to pay out of the funds he was authorized to collect for Barton, Miller & Co. from the Home Mutual Insurance Company, the president of said company being notified thereof.

The court gave judgment recognizing the preference of Block, Britton & Co. as first attaching creditors and afterwards the preference of Peet, Yale & Bowling under their subsequent attachment. The demand of the intervenors, J. M. Lewis & Co., was rejected.

From this judgment J. M. Lewis & Co. have appealed; Charles Clinton has also taken an appeal.

As to Charles Clinton, we are at a loss to perceive that he has any pecuniary interest in this litigation. He sets up no adverse claim to the funds in dispute. He is not personally bound to J. M. Lewis & Co., because he only agreed to pay the draft provided he should collect the

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drawers' funds from the Home Mutual Insurance Company, which he has not done.

Of our own motion we must dismiss this appeal for want of pecuniary interest by the appellant in these consolidated suits. We think the court did not err in distributing the funds in controversy.

The fact that the president of the Home Mutual Insurance Company knew that Barton, Miller & Co. had given J. M. Lewis & Co. an order or draft on their agent Charles Clinton which he agreed to pay out of the funds of the drawers when collected from the Home Mutual Insurance Company, did not divest the legal title of Barton, Miller & Co. in and to said funds, nor place them beyond the reach of their attaching creditors, the plaintiffs herein.

If the Home Mutual Insurance Company had been the drawees, instead of Charles Clinton, the case would have been different and the authorities cited by appellants would have applied. Or if the funds had been attached in the hands of Charles Clinton, the authorities cited would be applicable.

It is therefore ordered that the appeal of Charles Clinton be dismissed at his cost and that the judgment herein be affirmed, J. M. Lewis & Co. appellants, paying costs of their appeal.

Rehearing refused.

— No. 3424.

MRS. ELLEN YZNAGA DEL VALLE AND HUSBAND v. STEAMBOAT RICHMOND AND OWNERS.

The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience according to the passenger's condition in life and the journey undertaken by him, and for such sum as might be deemed necessary for his expenses.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont*, J. Jury trial. *George L. Bright*, for plaintiff and appellant. *R. H. Marr*, and *Thomas Hunton*, for defendants and appellees.

TALIAFERRO, J. The plaintiffs seek to render the defendants responsible for the value of a set of jewels lost by Mrs. Yznaga while on board the steamer as a passenger, and of which she alleges she was robbed by thieves, who opened and entered her state room in the night time. This loss she avers was caused by the fault, negligence, and want of care of the officers of the boat in not guarding with sufficient diligence against the occurrence of such acts; that during the trip, on

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which this theft or robbery was committed, there were professional thieves allowed by the officers to come on board and take passage and travel on the boat; that a large number of immigrants or deck passengers were on board, who, contrary to custom and propriety, were permitted to sleep upon the floors around her rooms, endangering the safety of her property, baggage, etc., and rendering her position on board most disagreeable and uncomfortable.

She avers that she was denied suitable rooms for herself and daughters in the ladies' cabin, but was required to occupy rooms in the gentlemen's cabin, where she was more exposed to the danger of theft. She alleges the value of the stolen property to be \$6015, and prays judgment for that amount with interest from judicial demand and costs of suit, with lien and privilege on the boat, etc.

The answer specially denies every allegation of the plaintiff, tending to charge defendants with liability for the alleged loss; and avers that if any such loss did occur on board their boat, it arose from want of prudence and care on the part of the plaintiff, and not by the fault of the defendants.

The case was tried before a jury. A verdict was rendered in favor of the defendants, and from the judgment in pursuance of the verdict the plaintiffs have appealed.

It seems that Mrs. Yznaga with her three children, in returning from a summer tour in 1869, took passage at Memphis in November of that year for Waterproof, in the parish of Concordia, in this State, on board the steamer Richmond. During the voyage, Mrs. Yznaga discovered one morning on rising from bed, that the pocket of her dress, which had hung during the night in her state room, had been cut and her jewels enclosed in a small box, left in the pocket on retiring to rest, had been abstracted. Notice was soon given, and by general consent of all the passengers on board, a search was made of their persons and baggage, but without success.

The allegation that there were professional thieves on board the boat, and that to the knowledge of the officers of the boat, we do not find sustained by the evidence. Two men who took passage at Memphis for Helena, and paid their passage to that place, did not leave the boat on arriving there, and this aroused the suspicion of one of the clerks that the men were dishonestly intending to reach some point lower down the river without paying the additional fare. One of these men paid the additional sum required, but was severely beaten by the clerk and put on shore at some way landing above Vicksburg. The other also, by the clerk's testimony, was "thrashed," as he termed it, and discharged. These were the only persons on board shown to be of exceptional conduct. Nobody, it seems, suspected them of being

thieves. On one occasion only, it appears, were immigrants allowed to sleep in a different place from that assigned them, and that was a case where a family that had known better days, were allowed for one night only a more comfortable place for lodging, an accommodation granted at the solicitation of a number of the cabin passengers who paid by contribution the charges made for the accommodation. But the place assigned this family was at a considerable distance from the plaintiff's rooms. The family left the boat the next day and before the robbery took place.

The large number of female passengers on that trip of the boat placed it out of the power of the officers to furnish the plaintiff and her daughters state rooms in the ladies' cabin, a fact of which Mrs. Yznaga was distinctly informed before she came on board. She was shown comfortable rooms in the gentlemen's cabin, which she accepted and expressed herself satisfied with. The evidence shows that the plaintiff and her family were not placed in a situation more exposed to depredations of the kind she complained of, than were the other passengers. The same efforts appear to have been made by the captain and clerks for the security and comfort of the plaintiff and family that were made for others.

The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience, and for such sum as might be deemed necessary for his expenses according to the passenger's condition in life and the journey undertaken by him. 7 An. 362; *Simon v. Miller* and 5 An. 604; *M. & T. Bank v. Gordon*; 18 An. 664; 20 An. 402; 1 Martin, 196.

Mrs. Yznaga, it appears from the evidence, is a lady who has traveled in Europe as well as in the United States and other countries, and is not without knowledge of the caution which a person of prudence should use when traveling, to avoid losses from sharpers and thieves found in all countries along the principal lines of travel. She says in her own testimony that while at the Galt House in Louisville, she was in the habit of depositing her jewelry in the safe of the hotel whenever she went out. On her trip down the river from Memphis she was unaccompanied by her husband or any male friend, having with her three children, the eldest a girl of about twelve years of age. The jewels were carried constantly in the pocket of her dress, and left in it at night when she retired to rest. Frequently during the day she went forward in the cabin among the large number of passengers; and on one occasion, when her sympathies were excited in behalf of the pas-

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senger whom the clerk was beating and about to put ashore, for the reason, as she supposed, that he was unable to pay his passage, she rushed down to the lower deck among a large and promiscuous crowd of men, and offered to pay the man's passage.

The evidence clearly establishes in our minds that there was on her part a great want of circumspection and care in reference to the security of the valuables which she lost, and that the loss may, to some extent, be attributed to her own lack of precaution, and not to any fault of the officers of the boat who had never had the jewels in their custody for safe keeping, and who doubtless were entirely ignorant that she had such articles until their loss was announced.

The case was before a jury, and we are satisfied they made the proper disposal of it.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 3541.

FLASH & Co. v. A. W. NORRIS—REYNOLDS, DOWLING & Co., garnishees.

The plaintiffs contend that the garnishees having admitted that they owed Norris, the defendant, the sum of \$2933, it is incumbent upon them to prove the correctness of every item of the sum they claim the right to retain, which plaintiffs aver the garnishees have failed to do. There is no evidence introduced by the plaintiffs to disprove the truth of the answers of the garnishees. The extent of the liability of garnishees is to be tested by their answers to interrogatories, when the truth of those interrogatories has not been disproved.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hudson & Fearn, B. R. Forman*, for plaintiffs and appellants. *John H. Ilsley*, for garnishees and appellees.

TALIAFERRO, J. The plaintiffs alleging that the defendant, an absentee, owes them forty-one hundred dollars proceeded against him by attachment and took out garnishment process against Reynolds, Dowling & Co. In answer to interrogatories propounded to them they said they had in their hands subject to plaintiffs' claim against Norris \$1563 10, and no more. Their exhibit is that they owe Norris \$2935, subject to a credit of \$278 55, paid Cantrell & Brother, and that they retain the sum of \$1093 to pay laborers, for teams etc. and acknowledge a balance due of \$1563 10. Reynolds, Dowling & Co. it seems, had contracted to do certain work for the New Orleans, Mobile and Chat-

tanooga Railroad Company in the construction of their road between New Orleans and Donaldsonville. Norris was a sub-contractor under Reynolds, Dowling & Co. In the contract between Norris and the garnishees it was agreed that "payments shall be made on the tenth of each month of ninety per cent. of the amount of the work done in the preceding month and, that A. W. Norris shall pay all laborers in his employ, and for all materials delivered on his contract monthly. And in case of the failure of Norris to do so, Reynolds, Dowling & Co. shall have authority to retain in their hands for the payment of workmen employed, etc. such an amount of any monthly or other estimate as they may deem proper, and may adopt such measures for the disbursement of such money retained as they may consider most judicious for the interests of all parties concerned."

Judgment was rendered against Norris for \$2887, and against the garnishees for \$1563 10. On the same day a rule was taken against the garnishees to show cause why they should not be compelled to pay the balance in their hands after deducting the amount of the judgment against them, viz: the sum of \$1371.

The plaintiffs contend that the garnishees having admitted that they owed Norris the sum of \$2933, it is incumbent upon them to prove the correctness of every item of the sum they claim the right to retain which plaintiffs aver the garnishees have failed to do.

On the other hand the garnishees hold that their answers never having been disproved or contradicted by the plaintiffs must be taken to be true; and as Norris could not under his contract with them have claimed any sum retained by them as shown by their answers to the interrogatories, the attaching creditors have no greater rights than Norris. A rule was taken by the plaintiffs against the garnishees to show cause why their answers should not be traversed. No answer to the rule was filed, but the rule was tried contradictorily between the parties and the rule was dismissed. From this judgment the plaintiffs have appealed.

There was no evidence introduced by the plaintiffs to disprove the truth of the answers of the garnishees. In the case of *Oakey et als. v. the Mississippi and Alabama Railroad Company*, 13 L. R. 570, it was held that the extent of the liability of garnishees is to be tested by their answers to interrogatories, when the truth of these interrogatories has not been disproved. Subsequent decisions are to the same effect. 16 An. 137; *Ibidem* 253; 25 An. 365.

We think the decree of the court *a qua* correct.

Judgment affirmed.

Rehearing refused.

Hardy v. Stevenson.

No. 5369. ✓

MRS. MARY HARDY v. JOHN A. STEVENSON.

The judgment in this case having been rendered at a different time from that at which the appeal was applied for, the appeal could be taken only by petition and citation. Therefore the motion to dismiss must prevail.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Muse & Philips, Barrow & Pope*, for plaintiff and appellant. *Breaux, Fenner & Hall*, for defendant and appellee.

HOWELL, J. The judgment appealed from was signed on the twenty-fourth May, 1873, and on twenty-third May, 1874, an appeal was taken on motion in open court. Appellee now moves to dismiss the appeal on the ground that it was taken on motion at a different time from that at which it was rendered and no citation has been issued or served.

The motion must prevail, the judgment having been rendered at a different time from that which the appeal was applied for; the appeal could be taken only by petition and citation. C. P.

It is therefore ordered that the appeal herein be dismissed at appellant's costs.

No. 5387. ✓

W. B. SCOTT & Co. v. A. B. SEELYE.

The rule is that want or failure of consideration will be no defense or bar to the title of a *bona fide* holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein.

A valuable consideration is one having value or worth, and it is not measured by any particular degree or amount. There must be value, but not necessarily full value, which is not always easily determined. The agreement of the parties must fix the value. A small price is value, and where it is not clearly a sham, must be accepted as valid. In this instance, this court can not say that the willingness of the holder of the notes before maturity to take one hundred dollars for said notes, which were each for \$2500, was, of itself alone, notice to the purchaser of a want of consideration.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. Hornor & Benedict*, for plaintiffs and appellants. *Ogden & Hill* and *O. N. Ogden*, for defendant and appellee.

HOWELL, J. This is a suit on two promissory notes of \$2500 each, the answer to which alleges that plaintiffs obtained them after maturity and subject to equities between the maker and the first holder. When the answers of one of the plaintiffs to interrogatories were filed showing that the notes were purchased before maturity for the price of one hundred dollars, an amended answer was filed showing that the notes were not received by plaintiffs in the usual course of business nor for a valuable consideration, and the contract by which plaintiffs

obtained them is tainted with usury and is therefore absolutely null by the laws of New York where it was made.

The laws of New York are not in evidence and there is nothing in the record which shows any bad faith in the plaintiffs and nothing to impeach their title to the notes, except the smallness of the price paid for them, and the proof does not make it clear that this price was merely nominal.

The rule is that want or failure of consideration will be no defense or bar to the title of a *bona fide* holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein. Story on notes, §§. 191, 192. A valuable consideration is one having value or worth, and is not measured by any particular degree or amount. There must be value but not necessarily full value, which is not always easily determined. The agreement of the parties must fix the value. A small price is value and when it is not clearly a sham, must be accepted as valid. We can not say that the willingness of the holder before maturity to take one hundred dollars in this instance was, of itself alone, notice to the purchaser of a want of consideration. The notes were offered at that price and the plaintiffs, who are dealers in New York in such instruments, said they were willing to give it and did so. Whatever may be the responsibility of the first holders to the maker, we think under the commercial law and the authorities, plaintiffs must recover.

It is therefore ordered that the judgment appealed from be reversed and that plaintiffs recover of defendants the sum of five thousand dollars with eight per cent. on \$2500 from first October, 1872, and on like sum from first November, 1872, and costs.

Rehearing refused.

✓
No. 3926.

FRANCIS C. MAHAN, Liquidator, et al. v. FREDERICK MICHEL and WIFE.

When an appellee asks for an amendment of the judgment, he will not be allowed damages for a frivolous appeal.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Braughn, Buck and Dinkelspiel*, for plaintiff and appellee. *Wenck & Hufft*, for defendants and appellants.

HOWELL, J. The defendant, Michel, has appealed from a judgment against him for a portion of the claim of plaintiff. The latter has

Mahan, Liquidator, et al. v. Michel and Wife.

asked for an amendment of the judgment, allowing him the whole amount claimed, and for damages for a frivolous appeal.

An examination of the record satisfies us that the judge *a quo* did not err.

When an appellee asks for an amendment of the judgment, he will not be allowed damages. 6 R. 450; 8 An. 73.

Judgment affirmed.

No. 5447.

ALBERT B. EDGERLY, Executor of JOHN MARSHALL, deceased, v. W. G. SMITH.

Where the minutes of the court below do not show that the order was allowed on the motion for an appeal, but where it is stated elsewhere in the record by the judge that he did grant the order, this court will not be disposed to make an appellant suffer for such neglect of duty by the clerk of the court *a qua*.

Where a suspensive appeal was allowed, but the bond was not filed until more than ten judicial days after the judgment was signed;

Held—That the bond being for the amount fixed by the judge, the only penalty incurred by the appellant was the right of the appellee to issue execution, the appeal operating simply as a devolutive one. The *ex parte* order setting aside the appeal, under the circumstances, did not divest this court of jurisdiction.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J. E. D. *Craig*, for plaintiff and appellee. *F. McGloin*, for defendant and appellant.

HOWELL, J. We are asked to dismiss this appeal on the grounds:

First—That there is no order of appeal or return day fixed by the court below.

The motion for an appeal with the usual order appended is in the record and we might consider this insufficient, as we have before held, because the minutes of the court below should show that the order was allowed; but in this case we find it stated elsewhere in the record by the judge, that he did grant the order, and we are not disposed to make an appellant suffer for such neglect of duty by the clerk of the district court.

Second—The suspensive appeal taken by the appellant was dismissed by the lower court and no subsequent appeal has been taken.

A suspensive appeal was allowed, but the bond was not filed until more than ten judicial days after the judgment was signed. The bond being for the amount fixed by the judge, the only penalty incurred by the appellant was the right of the appellee to issue execution and the appeal to operate simply as a devolutive one. The *ex parte* order setting aside the appeal, under the circumstances, did not divest this court of jurisdiction.

Edgerly, Executor of Marshall, v. Smith.

The third ground is the corollary of the others and is of no avail.

The motion is refused.

On the merits we see no reason for disturbing the judgment. It was rendered on default and we think the evidence sustains the confirmation thereof. The court *a qua* did not err in refusing the evidence offered on the hearing of the rule for a new trial.

Judgment affirmed.

No. 4902.

THOMAS E. M. SMITH *v.* PATRICK DONNELLY.

The demand in this case being in the alternative, there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the partnership assets, or alleged to be a part thereof, when in truth, they were not so alleged to be.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. E. H. McCaleb*, for plaintiff and appellant. *E. C. Mix*, for defendant and appellee.

HOWELL, J. The plaintiff setting out a partnership between himself and defendant, and a disagreement between them and a submission of their differences to amicable compounders, brought this suit to homologate and enforce the award which was made by said amicable compounders under the stipulation, in reference thereto, in the act of co-partnership, or in the alternative, for judgment on two notes given to him by defendant for one-half the value of the property put into the partnership by plaintiff. The defendant excepted that the demands of the plaintiff were inconsistent and prayed that he be ordered to elect on which he would proceed. The judge sustained the exception and ordered the plaintiff to elect accordingly. The plaintiff in obedience to this order, but reserving all his rights, elected to proceed on the notes and prayed judgment thereon. The defendant then filed what he called a peremptory exception, alleging that plaintiff's petition set out no cause of action, because the said notes are alleged to be a part of the assets of the late firm and said partnership has not been settled and liquidated. He also filed an answer setting up the defenses which it appears were made before the amicable compounders. This exception was maintained and plaintiff's suit dismissed, reserving his right to sue for any amount that may be due on liquidation of the partnership, from which plaintiff has appealed.

 Smith v. Donnelly.

We think the judge *a quo* erred in each of his rulings. The demands were in the alternative, and there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the partnership assets or alleged to be a part thereof. The truth is they were not so alleged to be.

But we are unable to dispose of the case and render a judgment in favor of plaintiff as he asks us to do, because no issue was joined on the demand for the homologation of the award of the amicable compounders and because the case was not tried and no evidence offered on the merits on the demand for judgment on the notes. We have no original jurisdiction of these demands.

It is therefore ordered that the judgment appealed from and the order of fifteenth May, 1873, maintaining the exception and directing the plaintiff to elect, be reversed and set aside and said exceptions be overruled, and that this cause be remanded to the lower court to be proceeded with according to law. Defendant to pay costs of appeal.

 No. 5390.

SUCCESSION OF S. MARX.

The right granted to the widow or minor children of a deceased person by the homestead act, vests in them at the time of the death of the deceased, provided their condition of life at that moment entitles them to the benefit of the provisions of the act; their pecuniary circumstances at the time of the death of the insolvent, and not at any subsequent time, settles their right to any claim under the act.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Julian Michel & Charles Louque*, for tutrix and appellant. *E. J. Wenck & J. L. Tissot*, for opponent and appellee.

TALIAFERRO, J. The controversy in this case relates chiefly to whether the widow of the deceased is entitled to the benefit of the Homestead act upon her avowal of being left in necessitous circumstances at the death of her husband. Marx died in December, 1868, leaving a widow and six minor children. The property of his estate, real and personal, was appraised at \$4245. There were debts against the estate amounting to \$1200. The widow and tutrix, upon the advice of a family meeting, borrowed money by mortgaging the real estate to pay the debts. The money was loaned by one Boesel, the

principal creditor. When the debt to Boesel became due and there being no means of the estate to pay it, the tutrix by advice of a family meeting, sold the property to raise money for that purpose. On filing her account she placed herself upon it as entitled to one thousand dollars for the benefit of herself and children under the homestead law. The account was opposed by Boesel, who denies her right to the benefit of the act and who opposed various other items of her account. The judge *a quo* sustained the opposition, rejected the item for homestead claim, reduced the items for attorney's fees and services of the appraisers, struck out the charge of the tutrix for commissions, and as thus modified homologated the account.

From this judgment the tutrix appealed. The judge *a quo* thought that, as it is shown the estate at the time of the death of Marx was worth \$3045 over and above the amount of its debts, it can not be taken as insolvent, nor that the widow was left in necessitous circumstances. He assumed under the authority of the case of the succession of Norton, 18 An. p. 36, that "the right granted to the widow or minor children of a deceased person by the homestead act, vests in them at the time of the death of the deceased, provided their condition of life at that moment entitles them to the benefit of the provisions of the act; their pecuniary circumstances at the time of the death of the insolvent and not at any subsequent time, settles their right to any claim under the act."

We find no reason for altering the decree of the lower court.

Judgment affirmed.

Rehearing refused.

No. 3889.

LUCY HAMMITT AND HUSBAND v. PAYNE, HUNTINGTON & Co.

Where final judgment was rendered in favor of the two members of the defendant firm, who were before the court, and the appeal was taken as to one only:

Held—That both defendants having an interest in maintaining the judgment, should both have been made parties. The motion to dismiss the appeal must prevail.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Semmes & Mott*, for plaintiff and appellant. *Breaux, Fenner & Hall*, for Payne, defendant and appellee.

HOWELL, J. A motion is made to dismiss this appeal for want of proper parties.

Judgment, it seems, was rendered in favor of the two members of the defendant firm, who were before the court, and the appeal was taken as to one only. Counsel for plaintiff in their first brief say: "If the

Lucy Hammitt and Husband v. Payne, Huntington & Co.

judgment of the court below had been final and *res judicata*, the motion to dismiss for want of proper parties would have been good."

The judgment reads: "It is ordered that the plea of prescription herein filed by defendants be sustained and that this suit be dismissed at plaintiff's costs."

This is a final judgment, settling definitely the right of action against the defendants, in their favor. Both defendants have an interest in maintaining the judgment and should be made parties.

We think the jurisprudence is adverse to the ruling in the case in 6 R. 131, cited by plaintiff's counsel in their second brief.

It is therefore ordered that the appeal be dismissed at costs of appellant.

No. 3946.

SAMUEL LOGAN v. CITY OF NEW ORLEANS.

The rule seems to be that the powers of all corporations are limited by the grants in their charters and can not extend beyond them. But, if to provide for the relief of the indigent, who are unable to procure for themselves the needs of suffering humanity, is an essential part of municipal government, the right to determine the means, form and manner of extending the relief according to the exigencies of each particular case, must exist also. In this case, two policemen, who had been severely wounded in the discharge of their duties by gun shots, and who were poor and destitute, had applied to the City Council for assistance. If the council had power to provide for them at all, it surely had the power to provide the assistance most needed—that of the services of a skillful surgeon.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Jury trial. *Sambola & Duoros*, for plaintiff and appellee. *Samuel P. Blanc*, Assistant City Attorney, for defendant and appellant.

TALIAFERRO, J. The plaintiff, a physician and surgeon, brings this suit for services rendered in those capacities to two men belonging to the Metropolitan police force, who were wounded in a riot that occurred in the city of Jefferson, in the year 1869. He alleges that the services rendered were engaged by the City Council of Jefferson, who authorized its Mayor to employ a surgeon to attend the wounded men. He predicates his claim, now brought against the city of New Orleans, upon the provisions of the act incorporating the city of New Orleans and Jefferson, by which the former is obligated to pay the debts and liabilities of the latter.

The plaintiff's medical bill amounts to \$1600.

It is not disputed that the services were rendered as charged, nor that they were not worth the amount charged. The main ground of defense is that the City Council of Jefferson were without authority

to employ the plaintiff to render the services performed by him. The case was tried twice in the court below, and each time before a jury. The first trial resulted in favor of the defendant, the last in favor of the plaintiff, and the defendant has appealed.

The inquiry seems to be, had the municipal corporation of the City of Jefferson the power to employ a surgeon in the case presented? The charter of the city grants the power of exercising all the rights and powers of municipal corporations generally. Acts of 1867 p. 105, and acts of 1868, p. 99. It was held by this court, in the case of *Vionet v. The First Municipality*, 4 An. 43, "that if it is a constituent power of municipal corporations to provide for the poor who are unable to labor, and during the prevalence of an epidemic, there is none the exercise of which is more imperative than that of furnishing medical assistance to those who are unable to procure it themselves." In that case the question was, whether the council had the power to authorize the aldermen in their respective districts to select physicians and apothecaries who were to give and provide remedies for the indigent sick, during the prevalence of the epidemic. It was held that the council had the power. The court proceeded to say, that "the power had been exercised by the former corporation of New Orleans, and we believe is admitted by all writers of authority to be an essential part of municipal government," and referred to Blackstone's Commentaries, 131, 360, and to Domat Droit Public, Liber 1, title 16. The rule seems to be that the powers of all corporations are limited by the grants in their charters and can not extend beyond them. But if to provide for the relief of the indigent poor who are unable to procure for themselves the needs of suffering humanity, is an essential part of municipal government, the right to determine the means, form and manner of extending the relief according to the exigencies of each particular case, must exist also. *Cum quid conceditur, conceditur et hoc quod pervenitur ad illud*. In the case presented, the two recipients of the bounty were suffering from gunshot wounds; one of them had received wounds of a very dangerous character, from which he survived only after a confinement of many months, and requiring constant attention and frequent operations by the surgeon. It is shown that both were poor and destitute; the one most severely wounded having a wife. Surgical aid was then the most essential want of these persons. They had appealed to the council by petition for assistance. If the council had power to provide for them, it surely had the power to provide the assistance most needed, that of the services of a skillful surgeon.

We conclude the decision of the lower court is correct.

Judgment affirmed.

Belden v. Read & Hunt.

No. 2736.

FREDERICK BELDEN v. READ & HUNT.

Where a rule was taken to set aside an attachment, on the ground that the suit was based on a partnership transaction, and therefore plaintiff was not entitled to an attachment, for the reason that he could not swear to the amount due, until the rights of the partners should be settled according to law;

Held—That the term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants. The objection to the attachment, on the ground alleged, is therefore not well founded.

Where the question was whether the allegations in the petition and in the affidavit were sufficient to warrant the issuing of the writ of attachment, and the plaintiff prayed for judgment for \$3500, or such amount as should be found due according to said allegations, and where the affidavit was that "all the facts and allegations in the above and original petition were true and correct, and that the defendants were disposing of their goods, rights and credits, with intent to defraud their creditors;"

Held—That the allegations were sufficient, and that the affidavit was in conformity with law.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux, Fenner & Hall*, for plaintiff and appellant. *William Grant and A. B. Long*, for defendants and appellees.

MORGAN, J. Belden agreed to furnish to Reed & Hunt a stock of hats, caps and straw goods, to the value of from \$5000 to \$15,000, the goods to be delivered from Belden's store, at their invoice price, with three per cent. added to cover cost of transportation. It was specially agreed that goods were to be received by Reed & Hunt as on consignment, and that they are owned by Belden, and they were to be insured in his name, the premiums to be charged to the goods.

The proceeds of sales were to be turned over to Belden, without deduction, every week, until all the goods so consigned should have been paid for. At the expiration of the term of the agreement, the parties were to settle as follows: Belden was to take the goods remaining unsold at their appraised value, and to be liable for and pay one-half of the losses, and be entitled to receive one-half of the profits. Reed & Hunt to be liable for and pay to Belden one-half of the losses and be entitled to and receive one-half of the profits of the sales of the goods; the profits to be credited and paid to each party only when realized and collected, and after the consignment of goods should have been fully paid for to Belden.

Plaintiff avers that the defendants have constantly violated their agreement; that they have failed to pay over the proceeds of sales each week, as they were bound to do, and have failed to give statements and returns of sales, and that he is entitled to the possession of the merchandise, books, etc.; that he fears, unless aided by process of law, he will be deprived of his rights. He prayed for a writ of sequestration, ordering the sheriff to take into his possession the merchand-

ise in the hands of the defendants, which was the subject of their agreement, and that he be adjudged the owner, and be entitled to the possession thereof. The writ issued as prayed for on the affidavit of one of plaintiff's counsel, plaintiff being absent from the State at the time the suit was brought.

On the same day another petition was presented to the court in which the same allegations were substantially made, and in which it was averred that the defendants were withholding proceeds of sale amounting to at least \$3500. To secure their rights they prayed for an attachment. There is no allegation in the petition upon which an attachment could issue. There is, however, the affidavit of one of plaintiff's counsel that the defendants were disposing of their goods, rights and credits with intent to defraud their creditors. There is no allegation in the affidavit that the plaintiff was absent when the attachment was asked for. Neither the allegations in the petition nor the affidavit were sufficient to authorize the issuing of an attachment, and it was properly dissolved.

Subsequently another petition was filed in which it was specifically alleged that the defendants were disposing of their goods with a view to deprive the plaintiff, one of their creditors, and the proper affidavit was made by the plaintiff himself.

A rule was taken to set aside this attachment; first, because the security on the attachment bond was not good; second, because the suit is based on a partnership transaction, and therefore plaintiff is not entitled to have an attachment, for the reason that he can not swear to the amount due; third, because plaintiff has not sworn to any sum certain as due him in accordance with law.

The district judge considered that the agreement between the parties was a contract of partnership, and that therefore until the rights of the parties should be settled according to law, plaintiff could not swear to the amount due, and he dismissed the attachment. Of this the plaintiff complains.

We are to determine whether the contract between the parties was a contract of partnership. In our opinion it was not. The term partnership implies a community of goods, and a proprietary interest therein. Between these parties there was no community of goods, and no proprietary interest in the goods which the plaintiff was to deliver to the defendants, and which they were to sell. It was in fact and in terms a mere consignment which they were to dispose of, and it was expressly stipulated between them that the goods so consigned were to remain the property of the plaintiff.

The terms of the agreement were, that, upon a settlement, the goods should be taken at the price which they cost Belden, with a small per-

Belden v. Read & Hunt.

centage added, and that the profits and losses should be equally divided between them. The profits made were to be their recompense; the losses, they were willing to risk in consideration of the chances of gain, but this did not make them partners with the plaintiff in the ownership of the goods confided to them for sale. How then stands the case? Plaintiff's goods were in the possession of the defendants. They owed him a considerable amount of money; they had violated their agreement; they were disposing of their property with the view of defrauding their creditors. At least these are the allegations, and they must be taken for true as regards the issuance of the conservatory writ. Under these circumstances we think he was entitled to an attachment.

The remaining question is, whether the allegations in the petition and in the affidavit are sufficient to warrant the issuing of the writ.

Plaintiff prays judgment against the defendants for "\$3500, or such amount as shall be found due." The affidavit is that "all the facts and allegations in the above and original petition, are true and correct, and that said Read & Hunt are disposing of their goods, rights and credits with intent to defraud their creditors."

We think the allegations are sufficient and that the affidavit was in conformity with law. See *Fowler v. Griffith*, 12 La. 345. Defendant contends that the case cited conflicts with the cases of *Levy v. Levy*, 11 La. 581 and *Brinegar v. Griffin*, 2 An. 154. But an examination of these cases show we think a different state of facts.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the case be remanded to be proceeded in according to law.

No. 3644.

WIDOW F. L. CHARBONNET v. EDWARD DUPASSEUR et al.—A. ROCHE-
REAU, Intervenor.

It is the duty of the appellant to bring up a complete transcript, or in proper time suggest a diminution of the record, in order that it should be corrected, if possible, and the trial be proceeded with. The fault being imputable to the appellant, the appeal must be dismissed.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. Voorhies*, for plaintiff and appellant. *Johnson & Denis*, for intervenor and appellee.

WYLY, J. In this case the certificate of the clerk to the record is as follows: "that the foregoing 205 pages do form and contain a true, full and complete transcript of all the proceedings had, documents filed

Widow F. L. Charbonnet v. Dupasseur et al.—Rochereau, Intervenor.

and evidence adduced on the trial of the case, with the exception of the certificate of registry, St. Charles parish, offered in evidence by intervenor, Albin Rochereau, on twenty-fourth May, 1871, which is missing and can not be found, after due and diligent search being made for the same." * * * * *

This record was on file for nearly three years before the case was submitted and no *certiorari* was applied for, nor any effort made by appellant to correct it. The document missing when the record was made out, might have been found if diligent search had been subsequently made. Perhaps it may now be among the original papers of the suit. It was the duty of appellant to bring up a complete transcript, or in proper time suggest a diminution of the record in order that it should be corrected, if possible, and the trial be proceeded with.

The fault is imputable to the appellant, and the appeal must be dismissed. 7 An. 443; 8 An. 433; 17 An. 130; 21 An. 299; 18 An. 231.

Furthermore, the defendants have not been cited to answer the appeal.

It is therefore ordered that this appeal be dismissed at the costs of the appellants.

Rehearing refused.

No. 4676.

CITIZENS' BANK OF LOUISIANA, for the use of the PHENIX NATIONAL BANK OF NEW YORK v. JOHN BALTZ.

This is a suit on a mortgage note drawn by defendant, and lost in *transitu* from New York to New Orleans, to which latter place it had been sent for collection. The Citizens' Bank of Louisiana offered him a bond of indemnity if he would pay the note at maturity, which he declined. Under this statement of facts;

Held—That the defendant is liable for the interest due on the note from the maturity thereof; for counsel's fees. and for the costs of the act of mortgage. He could have avoided them all by depositing, or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default. But he is not liable for the costs of advertisement for the recovery of the lost note, as he can not be made to pay for either the misfortune or the negligence of plaintiff.

APPPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. A. Pitot*, for plaintiff and appellant. *Alcée J. Ker*, for defendant and appellee.

MORGAN J. Baltz owed a note, secured by mortgage, to the Phenix National Bank of New York

The note was sent for collection to the Citizens' Bank of Louisiana. The note was lost.

When it matured, Baltz expressed a willingness to pay it, provided the note was presented, in order that he might thus cause the mortgage to be erased. The Citizens' Bank offered him a bond of indemnity if he would pay the note. This he declined. Suit was instituted against him.

The only questions before us are: 1—Whether he is liable for the interest due on the note from the maturity thereof. 2—Whether he is responsible for counsel's fees. 3—Whether he should pay the costs of the act of mortgage. And lastly, whether he should be made to pay for the advertisement of the lost note.

To the three first questions we give an affirmative answer. He could have avoided them all by depositing, or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default.

To the last question we say, no. He can not be made to pay for either the misfortune or the negligence of the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be amended by condemning the defendant to pay to the plaintiff eight per cent. interest on one thousand dollars from the nineteenth December, 1870, until paid, six dollars costs of copy of act of sale, and fifty dollars attorney's fees, and that as thus amended the judgment of the district court be affirmed, with costs in both courts.

Rehearing refused.

No. 3938.

MISS HENRIETTA MORFIT v. JOSEPH FUENTES—HEIRS OF FARISH,
Called in Warranty.

Where the objection to the introduction of an original act of sale as evidence was: First—

Because it was not an authentic act, having but one witness; second—because there was no proof of signatures; and third—because the plaintiff, having declared on an authentic act, a private writing is inadmissible;

Held—That the judge *a quo* did not err in admitting the evidence; because it is sufficiently proved that the instrument was signed by the parties, and is not so inconsistent with the one declared on as to make it inadmissible. It was signed by a notary public, and failed in being authentic only for want of the signature of one of the two witnesses named in the act which was and has since been in the records of said notary. Besides it is proved that the price of the sale was received and that the mortgage retained by the vendor was duly canceled. This shows that the title passed from the vendor to the vendee.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Labatt & Aroni*, for plaintiff and appellee. *A. Pitot*, for defendant and appellant. *Hornor & Benedict*, for heirs of Farish, warrantors and appellants.

HOWELL, J. This is a petitory action to recover three lots of ground

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in the Third District of New Orleans. Plaintiff sets up title derived, through several mesne conveyances, from Daniel Clarke in September, 1809.

The defendant claims title from the heirs of T. H. Farish, which had its origin in the suit of *F. Marquez v. Myra Clarke Gaines and Charles Van Wyck*, under execution in which these lots with others were sold by the sheriff and purchased by said Farish.

Defendant calls his vendors and said Marquez in warranty. We should also state that he excepted to plaintiff's action while the judgment and sale in the above suit are not set aside.

The warrantors, heirs of Farish, besides the general denial, specially deny plaintiff's ownership, and that of the several vendors subsequent to Daniel Clarke, plead the prescription of ten, twenty, and thirty years, and call F. Marquez, Mrs. Gaines, and Charles Van Wyck in warranty. The last named was not made party to the suit. Marquez did not appear and default was taken against him. Mrs. Gaines answered disclaiming any title, averring that her father, Daniel Clarke, sold the lots in question in his lifetime to Commodore Porter.

Judgment was rendered in favor of plaintiff against defendant, and in favor of the latter against the heirs of Farish and Marquez, and in favor of said heirs against Marquez, reserving their rights against Van Wyck, from which judgment the defendant and the heirs of Farish have appealed.

On the trial plaintiff offered in evidence a copy of the notarial act of sale from Clarke to David Porter, before P. Pedesciaux, notary, on seventh September, 1809, to which the warrantors excepted, on the ground that it was a false copy. The objection being sustained, plaintiff then offered the original, to which warrantors objected: First—because it is not an authentic act, having but one witness; second—because there is no proof of signature; and third—because plaintiff having declared on an authentic act, a private writing is inadmissible, and they cite *Codé* of 1808, p. 304 art. 217; 5 N. S. 618 and 692.

The document was admitted under article 2235, Revised Civil Code, which says: "An act which is not authentic through the incompetence or the incapacity of the officer or through a defect of form, avails as a private writing, if it be signed by the parties."

We think the court did not err. It was sufficiently proved that it was signed by the parties, and the instrument is not so inconsistent with the one declared on as to make it inadmissible. The allegation is "described in a deed from the said Daniel Clarke, bearing date September 7, 1809, and signed by Pierre Pedesciaux, notary public." It was so signed and failed in being authentic only for want of the signa-

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ture of one of the two witnesses named in the act, which was and has since been among the records of said notary. Along with this and in support of it, two instruments were introduced showing that the agent of Clarke's executors collected the price from Porter, and that the mortgage retained by Clarke was duly canceled.

This shows that title passed from Clarke to Porter. Acts of transfer were introduced from D. Porter to his son, W. D. Porter, from the latter to H. M. Morfit, plaintiff's father, and from his coheirs to herself, which were severally objected to on grounds which, perhaps, might have force in favor of the heirs or creditors of the Porters and Morfit, but not in favor of the defendant and warrantors before us, who claim only by virtue of a sheriff's sale of said property as belonging to Mrs. Gaines and one Van Wyck, the origin or nature of whose title is not established. It is clear that Mrs. Gaines has and had no title to said lots, and the admission of title to some fifty-four lots, including these, in her answer, filed in the suit of Marquez v. Gaines and Van Wyck, did not divest the title which had vested in David Porter and the subsequent vendees.

We think the judgment in favor of plaintiff is correct; but that against the warrantors is defective for uncertainty in amount, no amount being mentioned, and the evidence does not enable us to fix the amount. The defendant paid \$7000 for fourteen lots, being at the rate of \$500 per lot, but the evidence shows that the dimensions and boundaries of the three lots claimed by plaintiff are different from those described in the act of sale to defendant. For the purpose of adjusting this matter and ascertaining the proportion to which defendant is entitled for these three lots, which, at the time of the sheriff's sale and the one to himself, were the "property of another," and not of the defendants in the execution or the vendors of defendant, the case will have to be remanded as suggested by defendant's counsel. The judgment, as to Mrs. Gaines, is correct, and as to Marquez, who has not appealed, it seems to be final.

It is therefore ordered that the judgment in favor of plaintiff against defendant, that in favor of Myra Clarke Gaines, and that as to Van Wyck, be affirmed, with costs in lower court as to each respectively. It is further ordered that the judgment in favor of defendant, J. Fuentes, against the heirs of T. H. Farish, as warrantors, be set aside, and the case as to these parties be remanded to the lower court for the purpose specified in the foregoing opinion. The costs of appeal to be paid by the appellants.

No. 4775.

TEUTONIA NATIONAL BANK OF NEW ORLEANS v. H. LOEB & CO.

The Teutonia National Bank was clearly without right to hold Loeb & Co.'s note, pledged to secure a particular debt of Gretzner, Winehill, & Co., on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co. with them, offered to pay and take up the note of the last named parties, the bank upon receiving payment in full for that note should have surrendered the collateral.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.* Jury trial. *Kennard, Howe & Prentiss*, for plaintiff and appellant. *B. R. Forman, Clarke, Bayne & Renshaw, Thomas, T. & Wm. H. Cooley*, for defendants and appellees.

TALIAFERRO, J. The plaintiff sues on a promissory note for \$2586, drawn by the defendants to the order of and indorsed by Gretzner, Winehill & Co., dated twentieth August, 1871, and due four months after date. The defense is that the plaintiff is not the owner of the note sued on; that it was made solely as an accommodation note for the benefit of Gretzner, Winehill & Co., who pledged it to the plaintiff to secure the payment to the Teutonia Bank of a note of their own for \$1000, maturing at an earlier date. The defendants allege that, after learning that this disposition had been made of the accommodation note, they went in company with one of the members of the firm of Gretzner, Winehill & Co. to the bank, and in presence of two witnesses tendered through its proper officers, in legal tender notes, one thousand dollars, with interest thereon to said date and costs of protest, to pay and take up the \$1000 note of Gretzner, Winehill & Co., and notified the said officers that the note for \$2586 they held as collateral security for the \$1000 note held by them against Gretzner, Winehill & Co., was an accommodation note without consideration; that the plaintiff refused to receive full payment of the \$1000 note and deliver up the note pledged to secure its payment; that defendants then notified the plaintiff not to protest the said note, and if they did they would be held liable for all damages that might result therefrom; that, notwithstanding, the plaintiffs persisted in holding said note against the will of Gretzner, Winehill & Co., as well as that of defendants, and did cause it to be protested, by which act the credit and character of the defendants, as merchants, were seriously affected and their business injured to the amount of at least ten thousand dollars. They allege that the thousand dollar note of Gretzner, Winehill & Co. has been paid. The defendants pray that the plaintiffs' demand be rejected, and they pray judgment in reconvention against the plaintiffs for ten thousand dollars damages, with legal interest from judicial demand, etc.

Judgment was rendered in favor of the defendants for ten thousand dollars, less the amount of Gretzner, Winehill & Co.'s note for \$1000 and interest, held by the plaintiffs. The plaintiffs appealed. In this court defendants ask that the credit allowed by the judgment be stricken out.

Pending the proceedings in this case in the lower court the plaintiffs sued out a writ of attachment against the defendants, on the allegation that they were about to convert their property into money or evidences of debt, with intent to place it beyond the reach of their creditors. The defendants' stock of merchandise and other personal property were seized by the sheriff, and afterwards released by the defendants on bond.

The Teutonia National Bank was clearly without right to hold Loeb & Co.'s note, pledged to secure a particular debt of Gretzner, Winehill & Co., on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co. with them, offered to pay and take up the note of the last named parties, the bank upon receiving payment in full for that note should have surrendered the collateral. It is fully proved that Loeb & Co. when they went to the bank carried with them legal tender notes wherewith to pay the thousand dollar note of Gretzner, Winehill & Co., and offered to pay it, which the bank refused to receive. The plea, therefore, that no tender was made of the money is unavailing; no formal tender was required after the money was refused by the bank.

We must concede from the mass of testimony in the record, in reference to the effect upon the credit of Loeb & Co., as merchants, resulting from the protest of their note, held by the bank against the earnest request of the makers, that they did, in reference to their credit in mercantile circles, suffer some injury; but the difficulty in such a case is to fix satisfactorily a sum in money that shall be the measure of the damages. We are of the opinion that the amount assessed by the jury is too large.

It is therefore ordered that the judgment of the lower court be annulled and reversed. It is further ordered that the plaintiff recover from H. Loeb & Co., the defendants, the sum of one thousand dollars; that plaintiff return to the defendants the note sued upon in this case.

It is further adjudged and decreed that H. Loeb & Co., recover from the plaintiffs on their reconventional demand, three thousand five hundred dollars. The plaintiff paying costs in the lower court, and the defendants and appellees the costs of this appeal.

Reiners v. St. Ceran.

No. 3631.

HENRY REINERS v. VALENTINE ST. CERAN—S. D. MAXWELL, Surety
on Appeal Bond.

A motion to dismiss an appeal on the ground that it is frivolous can not prevail, although it may be a good one for giving damages when the case shall be tried on its merits.
A party may obtain judgment on motion after ten days notice.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. J. E. Planchard & A. J. Villere*, for plaintiff and appellee. *Hornor & Benedict*, for S. D. Maxwell, defendant and appellant.

ON MOTION TO DISMISS.

HOWE, J. The plaintiff moves to dismiss the appeal of S. D. Maxwell, on the grounds: first—that it is frivolous, and second—that the appeal bond is not given for a sufficient amount.

The first reason is not a good one for dismissing the appeal, though it may be for giving heavy damages when the case shall be tried on its merits. The second reason is not sustained by the record. So far as we can gather from any thing in the record the amount of the bond is sufficient.

Motion overruled.

ON THE MERITS.

TALIAFERRO, J. The plaintiff sues the defendant Maxwell as surety on the appeal bond of St. Ceran from a judgment the plaintiff obtained against the latter.

In the lower court the plaintiff had judgment in his favor, and Maxwell appealed.

The only point made in the defense seems to be that in the court below, a rule to show cause why judgment should not be entered up against the surety was filed on the sixth of November, served on the seventh and the day fixed for the hearing was the seventeenth November, ten entire days not intervening between the seventh and the seventeenth.

We see the judgment was rendered on the eighteenth of November. We think the requirements of the law have been complied with. "The party may obtain judgment on motion after ten days notice." Revised Statutes, section 3736, page 725.

Judgment affirmed.

Rehearing refused.

Marceline Latoix v. Germania Insurance Company.

No. 3902.

MARCELINE LATOIX v. GERMANIA INSURANCE COMPANY OF NEW ORLEANS.

Where the defendants answered that they had issued the policy of insurance sued upon at the instance of Bader, agent of the plaintiff; that, when called upon to pay the premium, he referred them to plaintiff who declined paying on the ground that her agent must have paid it; that, afterwards calling on Bader and informing him of the failure of plaintiff to make payment, he advised them to cancel the policy, which they accordingly did, wherefore they were no longer bound :

Held—That where a policy of insurance is issued without prepayment of the premium, the inference is that the insurers intended to extend a credit for its payment; that it was not at the option of the company to cancel the policy; that they only had the right to claim a dissolution of the contract for nonpayment of the premium upon putting the other party *in mora*; that Bader was only empowered to apply for the renewal of the policy, and was without instructions or authority to consent to its annulment.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. M. E. Livaudais*, for plaintiff and appellee. *C. E. Schmidt*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sues defendants on a policy of insurance against loss by fire, and claims \$1900, the entire amount of the policy, alleging a total loss and destruction by fire of the building and premises insured. The defendants answer that they issued the policy at the instance of Theodore Bader, a merchant in good standing in the city who was in the habit of taking out insurances for various persons, and with customers of that kind it was the practice to collect the premiums at the end of each month; that when Bader was called upon to pay the premium he referred them to plaintiff who declined paying it, saying that her agent must have paid it; that afterwards calling on Bader and informing him of the failure of the plaintiff to make payment, he advised them to cancel the policy which they accordingly did. They contend that they are no longer bound, the policy being canceled by the authority of the plaintiff's agent. Judgment was rendered in favor of the plaintiff and the defendants have appealed.

Where a policy of insurance is issued without prepayment of the premium, the inference is that the insurers intended to extend a credit for its payment. We do not think that it was at the option of the company to cancel the policy. They had the right to claim a dissolution of the contract for non-payment of the premium upon putting the other party *in mora*. Neither do we think that Bader can be considered as an agent of the plaintiff clothed with power to consent to the annulment of the policy. It is clear we think, that Bader had no agency in the business further than to apply at the request of the plaintiff for a renewal of the policy, the previous one having expired. No payment was demanded of him. The policy was not delivered to him and he was without further instructions or authority from the plaintiff than to request a renewal of the policy.

 Marceline Latotx v. Germania Insurance Company.

An examination of the evidence inclines us to believe there is error in the decree of the lower court in regard to the value of the property. One witness puts its value at \$2200; another, at from \$1800 to \$2000; a third, at \$1800; this witness appraised the property in July, 1869; he put the entire property, lot and building at \$1800. He was of the opinion that the improvements alone, separately from the lot of ground, were worth \$1000. Assuming a medium estimate from the several amounts fixed by the witnesses, \$2000 may be taken for the value of the entire property. From this sum deduct \$800, the price for which the naked lot sold after the fire, there are then \$1200 left, from which should be deducted \$38, the unpaid premium and the remainder then is \$1162, the amount for which judgment should be rendered.

It is therefore ordered that the judgment of the lower court decreeing the plaintiff entitled to fourteen hundred dollars, be annulled and set aside, and it is now ordered that the plaintiff recover from the defendant the sum of eleven hundred and sixty-two dollars with legal interest from judicial demand and costs of suit, the plaintiff and appellee paying costs of this appeal.

 No. 5358.

SUCCESSION OF FRANCOIS BABIN—Opposition to account of Administratrix.

The right of the administratrix to revoke her power of attorney to administer the affairs of the estate which she had in charge, can not be doubted. All acts done by her agents under said special power, subsequently to the revocation and notice to them of the revocation, can not be considered as binding upon her. The account filed by them was without effect and the court *a qua* erred in acting upon it.

APPEAL from the Parish Court, parish of Jefferson. *Hyman, J. Charles Louque*, for the administratrix, appellant. *J. J. & A. J. Roman*, for opponents and appellees. *W. W. Edwards*, for absentee.

TALIAFERRO, J. Margaret Babin, one of the heirs of Francois Babin and wife of Wattigny was appointed administratrix of her father's estate in September, 1873, in place of August Babin, the former administrator, who left the State permanently without making a settlement of his administration. She gave as sureties on her bond Louis Gordon and Frederick Diebel. The conditions upon which they agreed to become her sureties were, that she should give the entire and exclusive control of the business of the estate to Messrs. J. J. & A. J. Roman, attorneys at law. They became her attorneys in fact, also under special power. The attorneys, accordingly, took the affairs of the estate in charge and continued in the settlement of its affairs until January or

Succession of Babin.

February, 1874, when the altercation arose which has connected itself with the administration of this estate. On December 23, 1873, the administratrix addressed to her attorneys a letter of revocation of her authority previously given to them to act for her in regard to the estate. This letter, it seems, was delivered to them on the day of its date. She again wrote to her attorneys on the twenty-ninth of January, 1874, rebuking them for presenting a tableau as her attorneys and formally discharging them as such. This letter was delivered to them, as appears by the testimony of a witness, on the day after it was written. The attorneys filed an account of the administration of the estate on the twenty-fourth of January. The administratrix had previously, on the fifteenth of that month, filed an account which was signed by herself and husband. A number of oppositions were filed to the account presented by the administratrix. The larger number of the opponents prayed that the account filed by the attorneys in her name be homologated. The judge *a quo* recognized the account filed by the attorneys as the proper and legal one, and proceeded to consider it against the exceptions and opposition of the administratrix. He rendered an order homologating the account allowing a claim of \$25 for work done on the property of Francois Babin, which had been disallowed by the attorneys. The oppositions to the account of the administratrix were sustained, and her account made to correspond with the second one as amended by the court. The administratrix has appealed.

We regard the proceedings as wholly irregular. The right of the administratrix to revoke her power of attorney can not be questioned. All acts done by them subsequently to the revocation and notice to them of the revocation can not be considered as binding upon her. The account filed by them was without effect and the court erred in acting upon it.

There are several bills of exception in the record which it is not important in this case to pass on.

It is therefore ordered that the judgment of the Parish Court be annulled and reversed. It is further ordered that the account filed by the attorneys be stricken from the record of the proceedings in the matter of the succession of Francois Babin deceased, and that the following changes and amendments be made in the account filed by the administratrix, viz: The clerk's opposition is dismissed and his claim for fees be allowed only for \$40 55. The opposition of Edwards, curator *ad hoc*, is sustained and his claim for \$40 allowed. In like manner, the opposition of Charvet & Duplantier for attorneys fees is sustained and their claim for \$61 85 be allowed. The claim of J. J. & A. J. Roman for \$250 is allowed; so also the claim of Kaiser for curbing be allowed for \$72 instead of \$50, as fixed by the administratrix. The claim of Con-

nell for paving is allowed for the amount of his bill \$141 10. Against the claim of August Babin for \$25 for work done for his father Francois Babin, the administratrix offers the prescription of three years. This must prevail. The evidence shows the work was done eight or nine years before the claim was presented. The oppositions of J. J. & A. J. Roman, of Gordon & Diebel, so far as they pray the account of the administratrix to be rejected and stricken out, are overruled as irrelevant.

The opposition of the said Diebel is sustained so far as relates to his claim for notarial fees, and he is allowed the full amount claimed, viz : \$73 50 instead of \$50 for which he is placed on the tableau. The sheriff's claim is allowed for \$18 70 instead of \$10 allowed by the administratrix.

It is lastly ordered that the account of the administratrix, as herein altered and amended, be approved and homologated. The costs of these proceedings to be borne by the succession.

No. 3912.

JOHN PAGE v. NICHOLSON & Co.

Where the terms of the contract for building were, that "no extra was to be admitted or allowed for, unless executed under written authority, and all omissions, additions or alterations should be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an endorsement, or no allowance for the same shall be made by the other party ;"

Held—That certain items of extra work claimed by plaintiff, could not be proved by parol evidence under the contract, and second, because they were outside of the contract, in no manner connected with the specifications in the contract, and contrary to the allegations in the petition.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Semmes & Tharp* for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendants and appellants.

MORGAN, J. Defendants appeal from a judgment condemning them to pay the plaintiff \$984 89, for extra work done on a certain building constructed for them by plaintiff. The allegation in the petition is that during the progress of the work certain alterations and additions were made thereon at the request of the defendants, and their claim for the amount above stated is the result of this work.

The terms of the contract were that "no extra to be admitted or allowed for, unless executed under written authority," * * * "and all such omissions, additions or alterations shall be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an endorsement, or no allowance will be made for the same by the other party."

On the trial the plaintiff offered to prove and did prove by parol, items of extra work amounting to \$1378 70, which is more than the sum claimed to be due.

To this evidence the defendants objected on the grounds, first—that, these items could not be proved by parol, under the contract, and second—that they were outside the contract and in no manner connected with the specifications in the contract, which was contrary to the allegations in the petition.

Both objections were good, and the testimony should have been excluded. This leaves the plaintiff without any case.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of defendant with costs.

Rehearing refused.

No. 3884.**STEAMBOAT CARRIE CONVERSE AND OWNERS v. JACOB FEITIG et als.**

Plaintiffs are not seeking in this case to recover a specific piece of property which they allege to have been unlawfully taken from them and found in the possession of defendants. The petition declares upon an indebtedness, inasmuch as the petitioners say that defendants are indebted to them in a certain sum of money, which one in their employ unlawfully took from them and which was subsequently taken from him in an unlawful manner by defendants who keep a gambling establishment. The court *a qua* did not err in dismissing the petition which showed no cause of action.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Given Campbell, J. A. Rozier*, for plaintiffs and appellants. *A. A. Atocha*, for defendants and appellees.

MORGAN, J. Plaintiffs allege that on the eighth May, 1871, they were the owners of \$2200 in United States currency; that on that day W. A. Devennoy, who was then in their employ, unlawfully took this money and went with it to a gambling house, kept and owned by the defendants, where, by means of persuasions and inducements, and by plying him with liquor, they induced him to gamble and bet against a banking game in their house, called faro, and that by unlawful devices and tricks, they got possession and control of this money. They allege that they had no knowledge of these facts at the time they were transpiring, and that they did not countenance or consent to them; that no legal title to this money ever passed from them to Devennoy, or to the defendants who unlawfully obtained possession of it, and have converted the same to their own use; that they have amicably demanded payment of the sum thus illegally detained from them by the defendants, wherefore, they pray for judgment against them *in solido* for \$2200.

It will be observed that the plaintiffs are not seeking to recover a specific piece of property which they allege to have been unlawfully taken from them and found in the possession of the defendants. The petition declares upon an indebtedness; they allege, in terms, that the defendants are indebted to them in the sum claimed and for the reasons above stated. In other words, they say that the defendants are indebted to them because one in their employ unlawfully took their money, which money was unlawfully taken from their employe by the defendants.

We think with the district judge, that they disclose no cause of action, and that their petition was properly dismissed.

Judgment affirmed.

Rehearing refused.

No. 5386.

DANIEL AND JAMES D. EDWARDS v. THE BRINGIER SUGAR EXTRACT-
ING COMPANY—Third Opposition of M. S. BRINGIER.

Where a patent, transferred for full paid in stock to a company, was subsequently seized and sold by the creditors of said company, and bought by the original proprietor of said patent, who paid the amount of the sale into the sheriff's hands, and claimed the same by virtue of his vendor's alleged privilege, as third opponent;

Held—That the clause in the charter that the full paid stock should not be issued until the ordinary stock should be taken, and its non issuance in consequence thereof, did not make the third opponent any the less the owner of his shares. Considering his transaction with the company as a sale, he received the price, and hence has no vendor's privilege, nor would he have any if considered as an exchange.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Hornor & Benedict*, for plaintiffs and appellants. *A. Canonge*, for M. S. Bringier, third opponent and appellee.

HOWELL, J. The plaintiffs, having judgment against the defendants, caused a certain United States patent to be seized and sold by the sheriff. It was adjudicated to M. S. Bringier, the original patentee, who paid the price to the sheriff and claimed the same by third opposition, by virtue of his alleged vendor's privilege. From a judgment in his favor the plaintiffs have appealed.

It is shown by the evidence that the third opponent transferred to the defendant company the patent in question, for and in consideration of three thousand three hundred and thirty-three shares of the stock of the company, and that he appeared on the books of the company and in the charter, as the owner of said stock. The clause in the charter that the full paid stock (of which opponent's was part) should not be issued to the stockholders until all the *ordinary* stock should

Daniel and James D. Edwards v. The Bringier Sugar Extracting Company. •

be taken, did not make the third opponent any the less the owner of his shares. He was recognized as the owner thereof, and so was his right to dispose of a part as he did, the transfer to be completed at the proper time. Considering his transaction as a sale, we think he received the price, and hence he has no privilege as vendor. As an exchange, he clearly has not a vendor's privilege.

It is therefore ordered that the judgment appealed from be reversed, and that the demand of third opponent be dismissed, with costs.

No. 5405.

E. A. DESLONDE, Testamentary Executor v. THE STATE NATIONAL BANK.

Where it clearly appears that neither the motion in open court was made, nor an order granting an appeal was obtained within the required time, the motion to dismiss must prevail.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Grover & Hunton*, for plaintiff and appellee. *J. McConell*, for defendant and appellant.

ON MOTION TO DISMISS.

TALIAFERRO, J. The grounds for this motion are :

First—That the motion for a suspensive appeal was not made in open court within ten judicial days after the judgment of the Superior District Court was signed.

Second—That there was no order of the judge of the Superior Court allowing a suspensive appeal or fixing the amount of security on the appeal bond within ten judicial days after the judgment was signed.

Third—Because the judge of the Superior District Court did not, within ten judicial days after the signature of the judgment, cause the order for a suspensive appeal to be entered upon the minutes of the court as required by law.

Fourth—Because the appeal was not taken and allowed in the manner and within the time required by law to operate as a suspensive appeal.

Fifth—Because the judgment was rendered upon confession.

It appears clearly that neither the motion in open court was made nor an order granting an appeal obtained within the required time.

The motion to dismiss must prevail. 21 An. 481 ; 20 An. 336 ; 17 An. 23.

It is ordered that the appeal in this case be dismissed.

Rehearing refused.

Cronan v. Cochran et als.

No. 2638.

DENNIS CRONAN v. EDWARD COCHRAN et als.

Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—that the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or of that of the court if the husband refused his assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs, could set up proceedings to annul.

The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt.

A purchaser at sheriff's sale can not maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure.

An adjudication under an illegal or insufficient seizure conveys no title.

In this case, the whole proceeding purporting to be *in rem* was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in actual possession thereof. The special law establishing certain formalities to be observed in judicial proceedings in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, does not apply to a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Horner & Benedict*, for plaintiff and appellant. *Jerome Meunier*, for defendant and appellee.

TALIAFERRO, J. This is a petitory action to recover a lot of ground with the buildings and improvement on it, situated in the Third District of New Orleans.

The petitioner prays to be decreed owner of the premises, and for rent for the same during the time he has been deprived of the use and enjoyment of the property.

The answer is a general denial. The defendant avers that he bought the property in question from Mrs. Julia Zoe, widow, by a former marriage, of John Sharkey, by notarial act dated June 11, 1864, and that he has been in continuous possession of it ever since. By way of re-convention, the defendant alleges the judgment under which plaintiff sets up title to be null and void and without effect. He calls in warranty his vendor, and prays judgment over against her if judgment be rendered against him. He prays that plaintiff's suit be dismissed and that he have judgment in his favor. Judgment was rendered in his favor, and the plaintiff has appealed.

The plaintiff derives title from a sheriff's sale, made under an execution issued upon a judgment obtained by himself in a suit styled *Dennis Cronan v. A Lot of Ground*, etc., numbered 9865 of the docket of the Sixth District Court of New Orleans.

The defendant exhibits as the muniment of his title a notarial sale and transfer of the property claimed by the plaintiff from the said Mrs. Sharkey, then wife of one McCollum, dated June 11, 1864.

The plaintiff introduces in evidence the record of the suit No. 9865 of the Sixth District Court, by which we learn that the plaintiff was under contract with the city of New Orleans, about the year 1860, to construct the sidewalks on Spain street, a work which he performed, and which was accepted by the city. In the performance of this job he constructed the sidewalk in front of the lot of ground in controversy, the cost of which amounted to seventy-nine dollars and eighty-seven cents. In February, 1862, the plaintiff by a proceeding *in rem* caused the property to be provisionally seized, on the ground that after diligent inquiry he was unable to ascertain who the owner was, and that he had a privilege upon the property. A curator *ad hoc* was appointed to represent the unknown party, contradictorily with whom plaintiff had judgment with recognition of the lien and privilege claimed. The property was sold under this judgment and the plaintiff bought it. A bill of exceptions was taken to the admission in evidence of the act of sale set up by the defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman, unauthorized in any manner to execute the deed. We think the court did not err in admitting it. The want of authorization of the husband or of that of the court, if the husband refused his assent, rendered the act she performed a relative nullity only; and one which only the husband or wife or their heirs could set up proceedings to annul. Civil Code, article 133; 5 An. 369; 9 An. 216; 10 An. 433; 17 An. 204.

Two other bills of exceptions were taken by the plaintiff. One to the question put by the defendant's counsel to the defendant himself, whether in the proceeding of Cronan, the plaintiff against the property, notice of seizure had been served upon the defendant. The other was to the refusal of the judge to strike out of the defendant's answer all portions thereof which allege error in the proceedings in the suit No. 9865, on the ground that the judgment rendered in that suit was *res judicata* between the parties thereto; and that Cochran acquired no rights to the property other than those of his vendor, who is estopped by law from contesting said proceedings, as it is alleged said vendor was present in the parish when the sale was made under which Cronan acquired title and suffered the same to be made without opposition. The purport of both these bills are to the same effect, and they may be disposed of together.

The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt. The decisions of this court have been frequent on this point. See the case of Surgi v. Colmer, 22 An. 20, and cases there referred to, and also 8 N. S. 105; 5 An. 678, and 11 An. 761.

We think the defendant has been successful in showing the nullity of the judgment set up as the basis of Cronan's title. The defendant sets out by announcing that it was essential to the validity of Cronan's provisional seizure that he should have had a privilege, and that the owner of the property should have been unknown. He then adduces in evidence the following facts to show that, at the time the writ of provisional seizure was issued, Cronan had no privilege. The surveyor's certificate, declaring the account correct, is dated twenty-fourth of February, 1860. The order of court for the issuance of the writ of provisional seizure was rendered on the fourth of November, 1862, more than two years after the date of the surveyor's certificate. The plaintiff bases his right to privilege on the act of 1840, p. 51, sec. 7. The defendant rejoins by referring to the proviso in that act which declares "that the privilege shall only exist when the account for paving, certified by the treasurer and controller, shall have been duly recorded in the mortgage office of this city, and shall exist only for two years after the tax has become due. If the registry were ever made, it was not until two years after the debt became due, when the right to the privilege and the privilege itself, if existing, was prescribed. It appears that the surveyor's certificate was recorded in the mortgage office on the ninth of January, 1863. The defendant shows that the house was occupied by the same tenant at the time of the construction of the sidewalks, and continuously afterward until 1865; that this tenant knew the property to belong to Mrs. Sharkey, rented it from her agent Nim, and afterward directly from her and paid his rent to her. The property was assessed in Mrs. Sharkey's name for the years 1861 and 1863. By ordinary diligence the plaintiff, it seems, might have ascertained that the owner of the property was not unknown. The seizure of the property was a mere paper seizure. Actual corporeal possession of the property by the sheriff was never effected. The jurisprudence on this subject is well determined by numerous decisions of this court. An actual taking into possession of the property by the sheriff is essential to the validity of a seizure. It was held in the case of *Cone v. Stafford*, 24 An. 262, that a purchaser at sheriff's sale could not maintain a petitory action to recover the property where it had not been actually taken possession of by the sheriff in making the seizure.

In the case before us this whole proceeding, purporting to be *in rem*, it is shown was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in the actual possession of the property. An adjudication under an illegal or insufficient seizure conveys no title. 11 An. 761; 12 An. 275.

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The sheriff recites in his return that he "notified personally John Culbertson, curator *ad hoc* for the unknown defendant, of the seizure, and caused said seizure to be recorded in the office of the recorder of mortgages for the parish of Orleans and city of New Orleans." It has been fully shown, as we have seen, that the owner of the property was not unknown, but, on the contrary, that he was in the possession of the property pretended to have been provisionally seized at the time it was made. The special law establishing certain formalities to be observed in judicial proceedings, in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, do not apply in a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages. See Revised Statutes, sections 3625, 3626, 3627 and 3628. We can regard the judgment of Cronan, under which he sets up title to the property, in no other light than a mere nullity, and conferring no right upon him.

It is therefore ordered and adjudged, that the judgment of the district court be affirmed with costs.

No. 3918.

MICHAEL MULLER v. H. L. STONE AND WILLOZ & ROSTAND—MARY CATHERINE AND WILLIAM MULLER, Interveners.

The proprietor of a building leased to a tenant is not liable in damages to third parties resulting from the use to which the tenant may put the leased property, unless it be shown that, at the time the lease was made, he knew the uses and purposes the tenant would apply it to, and that such use, from the nature of the business, would prove a nuisance.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble*, J. Jury trial. *Semmes & Mott*, for plaintiff and intervenors, appellees. *Hays & New*, for defendant and appellant.

TALIAFERRO, J. The plaintiff alleges that he is the owner of certain lots of ground and the buildings thereon situated at the corner of Gravier, Front and Fulton streets, in New Orleans; that the house he occupies at that locality is used both for the purposes of his business and as his family residence; the upper story of the building being appropriated for the use of the family, the lower story being used for a refreshment saloon. He complains that the adjoining building owned by the defendant Stone, and leased by him to Willoz & Rostand, is used by the lessees for the purpose of carrying on a sugar refinery, in the operating of which a steam engine of great power is used on the basement story of the building; that the working of this engine, which is in operation night and day, causes himself and family an annoyance

which is insupportable; that the force of this steam power rocks the foundation of the plaintiff's building, causing a tremor and cracking of the walls, which threaten the destruction of the entire fabric; that for the safety of his family and to relieve them from the constant noise, agitation and vapors proceeding from the action of the steam engine, he has been compelled to remove them to another residence for their safety and comfort. He alleges that from the same cause he has been injured in his business by the loss of the patronage of his friends, who decline coming to his saloon in consequence of the unsafe and uncomfortable condition of the plaintiff's establishment superinduced from the aforesaid causes. He prays damages to the amount of ten thousand dollars, and that the defendants be enjoined from operating the said steam engine in their said building to the danger and annoyance of the plaintiff. Catherine Muller and William Muller alleging that they are owners to the extent of an undivided half share and interest of the property occupied by the plaintiff, and from the proper use and enjoyment of which he is debarred by the defendants, intervened in this case joining the plaintiff and adopting all the allegations of his petition.

The defendants put in a general denial—aver that they have paid the city of New Orleans two hundred and four dollars as a license for carrying on their sugar refinery in the building referred to by the plaintiff; that the payment of this license and the granting of the permit by the city to them was preceded by an examination of the building by the city surveyor who reported the same to be of sufficient strength to prevent motion or vibration from the action of the steam engine used by the defendants. They aver also the payment of a State license for the same privilege. They pray that the plaintiff's demand be rejected, and that the city of New Orleans as their warrantor, be called in to defend them against the action. The city excepted that the defendants have no cause of action; that the permission granted to them by no means binds the city to maintain them in the use of the premises permitted to be used.

The case was tried before a jury, who awarded damages in favor of the plaintiff for the sum of fifteen hundred dollars. The defendant, Stone, has appealed. Two bills of exceptions were taken by defendants. Both refer to the charge of the judge to the jury. We do not find error in the charge given to the jury and think the exceptions were not well taken.

We think the plaintiff has fully made out a case which entitles him to relief. The important inquiry is whether Stone, the proprietor of the building leased to Willox & Rostand, is liable in damages. We have seen that the judgment of the lower court condemned the proprietor and the lessees *in solido*, and that Stone, the owner of the leased prem-

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ises, has alone appealed. Stone, it is shown at the time the lease was made by his agents, Green & Elder, was residing in the State of Massachusetts. Under date of July 9, 1870, Green & Elder wrote to Stone saying, "Mr. Willos wants the premises to put in apparatus for reboiling molasses," etc. On the fourteenth of the same month, Stone answers, "I prefer renting them (the stores) for some other purpose, but, on the conditions he names, that the floors should not be cut, the buildings to be returned as clean and in the same good condition as he receives them, etc., you may let him have them for three years at \$2500 for the first year, \$3000 for the second and \$3500 for the third." A sugar refinery was established on the premises instead of placing therein apparatus for reboiling molasses. The proprietor of a building leased to a tenant, it has been held, is not liable in damages to third parties resulting from the use to which the tenant may put the leased property unless it be shown that at the time the lease was made he knew the uses and purposes the tenant would apply it to, and that such use from the nature of the business would prove a nuisance. 4 Denio, p. 317.

We think that Stone can not be held responsible for the manner in which the sugar refinery may have injured the business of the plaintiff.

It is therefore ordered that the judgment of the lower court, so far as it condemns the defendant, Stone, to pay damages to the plaintiff, be annulled, avoided and reversed; it is further ordered that the plaintiff and appellee pay costs of this appeal.

No. 5352.

CHARLES DIAMOND v. ROBERT E. DIAMOND et als.

In this suit, instituted by plaintiff to recover his share in the succession of his grandfather and grandmother, the only question being whether the Second District Court, parish of Orleans, had jurisdiction to issue the order of sale to operate said partition;

Held—That the court *a quo* did not err, under the state of facts existing in the case, and by virtue of art. 924 of the Code of Practice, in maintaining its jurisdiction. Having jurisdiction, it could order the sale of the property to be partitioned, and it follows that the liens and mortgages on the property sold were shifted to the proceeds. The opponent, Sickorman, retains his right to participate in said proceeds to the extent of his mortgage. The purchasers of said property could not be compelled to pay the price before they were tendered an unencumbered title, and all that they required was the erasure of the mortgages on the property sold.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Hiram J. Grover, James H. Grover*, for plaintiff and appellee. *Robert J. Kerr, Hornor & Benedict*, for defendant and appellant.

TALIAFERRO, J. This suit was instituted by the plaintiff to recover his share of the successions of his grandfather and grandmother, de-

rived to him and his brother, representing their deceased father as one of the four heirs of their grand parents. Charles Diamond, the grandfather, died in the year 1867. His wife died in 1864. The surviving husband administered her estate. In 1865 he filed an account of his administration, by which it appeared that after paying the debts, the remaining assets of the estate amounted to about \$16,000. He never filed a final account, and was never discharged from his liability as administrator. It seems that Robert E., John A. and Amelia Diamond, three of the heirs of their mother, executed an act acknowledging to have received from their father all their portions of their mother's estate. Charles Diamond, Jr., the plaintiff, and his brother, Anthony, were not parties to this act, and as to them there was no release.

It appears that Charles Diamond, Sr., treated the assets of his wife's estate as his own. It seems to have been the fixed purpose of himself and the three heirs of age, to deprive the present plaintiff and his brother, heirs of a predeceased son, from all participation in the succession of their grandmother. Charles Diamond, Sr., left a will at his decease. He bequeathed all the property, that of his wife's estate as well as his own, to his three living children, before named, leaving nothing to the two grandchildren. He enjoined upon the three legatees to divide the property among themselves in peace and harmony. They proceeded to execute the will, Robert E. and John A. Diamond being the executors. In March, 1869, the three legatees proceeded to a partition of all the property among themselves. The portion which fell to the lot of Robert E. Diamond was the property known as the Louisiana Hotel. He executed a mortgage upon this property on the tenth of March, 1871, to secure a debt of \$3000; the notes given for the payment came into the hands of A. Sickerman, one of the appellants in this case. The plaintiff brought this suit, claiming one-fourth part of all their grandmother's estate, one-fourth of all the property mentioned in their grandfather's will, embracing, among other property, the Louisiana Hotel. They prayed the annulment of the will, for an inventory and partition, for recognition as heirs, and to be put into possession, etc. The contest was a long and arduous one. The defendants began their defense by the following exception:

"For exception to the jurisdiction of this honorable court (the Second District Court) in the premises, they allege that the plaintiff sues herein for a partition of the estates of Charles Diamond and Mary Onyet, deceased, which has descended to these defendants and which they are in possession of as heirs, by judgment of this honorable court, and the defendants say, therefore, that the court is wholly without jurisdiction to entertain a suit for partition such as is here brought."

The judge *a quo* overruled the exception, on the ground that where,

as in a case of this kind, when the heirs are all of age, residing in the State, and can not agree upon the partition and mode of making it, the court has jurisdiction; referring to Code of Practice, art. 924, paragraph 14.

There was a final judgment rendered in favor of the plaintiff, recognizing him as an heir of Mary Onyet and Charles Diamond, annulling the will, ordering the filing of an account, and decreeing that a partition be made of all the property of the estates according to law, etc. Here it seems the controversy ended between the heirs, the defendants having filed a motion for a suspensive appeal, but proceeded no further.

An auctioneer, duly authorized, proceeded to advertise the property for sale. After the advertisements were made, several creditors of Robert E. Diamond sued out writs against him in the other courts. The property was sold. The purchasers desiring to have the mortgages against the property released, a rule was taken upon the recorder of mortgages, and those holding recorded claims against Robert E. Diamond, to show cause why their mortgages should not be erased. Opposition was made by several persons. The rule was made absolute, and only Sickerman and the recorder of mortgages appealing from the judgment, ordering the mortgages to be erased.

The opposition of Sickerman seems substantially to be: that the Second District Court is without jurisdiction to render a decree of partition, and the judgment is null;

That the seizures against Robert E. Diamond after the order of sale by the Second District Court, divested that court of jurisdiction over the property ordered to be sold.

That the purchasers did not pay their money and execute their notes for a title before they got a title;

We do not find that the opposition has any force. Under the state of facts existing in this case, the court had jurisdiction. C. P. art. 924. The sale shifted the liens or mortgages from the property to its proceeds. The opponent, Sickerman, retains his right to participate in the proceeds to the extent to which his mortgage bore on the Louisiana Hotel. Robert E. Diamond could only mortgage what belonged to him. It is clearly shown that the plaintiff owned a share and interest in that property. The purchasers could not be compelled to pay the price before they were tendered an unencumbered title. All they required was the erasure of the mortgages on the property.

We think the judgment does no injustice to any of the parties, and it is therefore ordered that it be affirmed, with costs.

HOWELL, J., *concurring*. I concur in the conclusion in this case on the ground that the constitutionality of the article of the Code of

Practice in question is not raised in the case or by the parties, and it is not the provision of the court to raise such question.

Rehearing refused.

MORGAN, J., *dissenting*. As is stated in the opinion of Mr. Justice Taliaferro, this suit was instituted by the plaintiff to recover his share in the succession of his grandfather and grandmother. It is a suit not to be recognized as heir of a succession or to be put in possession of a succession under administration. It is a suit for a partition instituted by an heir of age against co-heirs of age, and third parties who had acquired an interest in or upon the property to be divided. Over such proceedings, between such parties, the Second District Court of New Orleans is, in my opinion, without jurisdiction. I think the exception to the jurisdiction should have been maintained.

No. 3974.

HENRY T. COTTAM v. GEORGE H. SMITH & Co.

A bill of exceptions being taken to the admission in evidence of a notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumption of the debts of an old firm by a new one, which it was the object of the evidence to establish;

Held—That the evidence was properly admitted. The defendants, by pleading a general denial, put at issue the question of their liability to pay the note sued upon, and the plaintiff had the right, by proper evidence, to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper, if by an agreement *inter se*, a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Braughn, Buck & Dinkelspiel*, for plaintiff and appellee. *E. K. Washington, Randolph, Singleton & Browne*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sued George H. Smith, Simeon Belden, J. W. Hillman, Edward Gay and James B. Eudt, severally and *in solido*, as commercial partners doing business under the style and name of G. H. Smith & Co., on a promissory note for \$1000, with interest, cost, etc. Judgment was rendered in favor of the plaintiff and the defendants appealed. The answer was a general denial. One of the partners, Simeon Belden, subsequently filed a separate answer. In this answer it is alleged that the promissory note sued on was indorsed G. H. Smith & Co. without authority from the commercial firm of G. H. Smith & Co.; that said note was neither given or indorsed by authority of said company, nor in connexion in any manner with the business of said commercial firm. The note, it seems, was drawn by

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James B. Eudt to the order of G. T. Raoul and by him indorsed, and further indorsed by G. H. Smith & Co. After the note was indorsed, Messrs. Belden and Hillman became members of the firm, but the new firm, by notarial act, assumed the obligations of the old one. A bill of exceptions was taken to the admission in evidence of this notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumption of the debts of the old firm by the new firm. We think the evidence was properly admitted. The defendants by pleading a general denial put at issue the question of their liability to pay the note, and the plaintiff had the right by proper evidence to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper. If by an agreement *inter se* a different rule were established by commercial partners it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement. In this case it is not alleged that any such agreement existed, and if there had, there is no proof that the plaintiff knew anything of it.

We think the decree of the court *a qua* correct.

Judgment affirmed.

Rehearing refused.

No. 5282.

MRS. ESTELLE ROSA WEAVER v. D. B. PENN AND ALFRED PENN.

Article 313 of the Revised Code and Article 964 of the Code of Practice do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the curator who was not appointed as such until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that, ten days before service of notice of protest, the heirs of the indorser of the note sued upon, had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to the indorser to his son-in-law at the residence of said indorser.

At the time of the protest, no legal representative having been appointed for the indorser, the notice addressed to him and left at his domicile on the day of protest was sufficient to fix his liability. The plaintiff, through the notary, had exercised reasonable diligence and given such notice of protest as under the existing state of facts the law required to be given.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Robert G. Dugué*, for plaintiff and appellee. *C. M. Conrad & Son, J. W. Thomas*, for defendant and appellant.

WILY, J. On eighteenth January, 1872, D. B. Penn executed his promissory note for \$5500, payable twelve months after date to the order of Alfred Penn who indorsed it, and plaintiff subsequently became the owner thereof.

On twenty-first January, 1873, this note was protested for nonpayment, and on the same day notice thereof, addressed to the indorser, Alfred Penn, was served, as stated by the notary, "at his residence No. 2 South street, in this city, on Mr. W. B. Krumbhaar, his son-in-law, by whom I was informed that said Alfred Penn was confined to his room by sickness and could not be seen or attend to business on the day below written." Ten days before the protest, to wit: on eleventh January, 1873, the children of Alfred Penn filed a petition in the Second District Court praying for his interdiction, and on fifteenth February following, judgment of interdiction was rendered against him.

Subsequently, George R. Preston was appointed curator of said interdicted person.

Plaintiff then brought this suit on said note against D. B. Penn the maker, and Alfred Penn the indorser, represented by his curator George R. Preston. There was judgment in the court below against both the maker and the indorser, and from this judgment Preston the curator. appeals.

Inasmuch as "the interdiction takes place from the day of presenting the petition for the same," Revised Code 400, and inasmuch as "all acts done by the persons interdicted from the date of filing the petition for interdiction until the day when the same is pronounced, are null," Revised Code, 401, the appellant contends that the service of the notice of protest is not valid and the estate of the interdicted person is released from liability on the note. He further contends that the plaintiff was not without recourse in regard to the service of notice of protest; that there were two modes, by either of which a valid notice could have been served:

First—Plaintiff could have provoked, under article 313, Revised Code and article 964, C. P. the appointment of a curator *ad hoc*, upon whom notice of protest could have been served.

Second—That notice of protest should have been served on the appellant, the curator of the interdicted person, as soon as he was appointed, which was on the fourteenth March, 1873.

The articles cited do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the appellant who was not appointed curator until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that ten days before service of notice of protest, the heirs of Alfred Penn had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to Alfred Penn to Mr. Krumbhaar, his son-in-law, at the residence of Mr. Penn.

Mrs. Estelle Rosa Weaver v. D. B. Penn and Alfred Penn.

At the time of the protest no legal representative had been appointed for Alfred Penn, and we think the notice addressed to him and left at his domicile on the day of the protest, was sufficient to fix his liability.

The plaintiff, through the notary, has exercised reasonable diligence and given such notice as under the existing state of facts the law required to be given. Story on Bills 370, Nos. 305 et seq.; 12 Barb. 245; Parsons on Bills 500, 501; Story on promissory notes 387 No. 310 and authorities there cited. See also, Stewart vs. Eden, 2 Caines 121; Merchants Bank vs. Birch, 17 John. R. 25; Willis vs. Green, 5 Hill; 9 Howard 552; 4 Howard 33; 6 Pet. 250; 10 Pet. 571; 22 An. 227.

It is therefore ordered that the judgment herein be affirmed with costs.

No. 5411.

SUCCESSION OF CELESTINE DORVILLE—in the Matter of the Executor's Account.

An inspection of the record in this case shows that there is no note of the evidence, and it appears that there was in fact no evidence introduced to sustain the various items in the executor's account, amounting to \$678 50, grouped in said account, as "amount of privileged claims paid." Under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. The ends of justice require that this case should be remanded.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. G. E. Schmidt*, for appellants on order of homologation. *A. J. Villeré*, for testamentary executor et als., appellees.

TALIAFERRO, J. The heirs of the widow de Santegeime alleging themselves to be creditors of the decedent, have appealed from the judgment of the Second District Court, homologating the second provisional account of the testamentary executor filed in that court, on the second of September, 1874. These appellants complain, that this judgment of homologation was rendered without legal notice having been given of the filing of the executor's account; that the items of the account are unsupported by any evidence; that the appellants are creditors of the decedent, Celestine Dorville, in the sum of \$11,087, exclusive of interest and costs; a part of this indebtedness, viz: \$4100, is secured by mortgage, the remainder being ordinary claims; that to enforce these claims they had instituted two suits, which were pending in the Second District Court at the time of the homologation of the account on the twenty-first September, 1874; that in March previous, the executor had acknowledged the indebtedness of the succession to the heirs of de Santegeime, on a mortgage note, amounting at

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that date, to \$6732, principal and interest, and filed a petition for a sale of part of the property of the estate, to raise means for paying this debt. It appears, that the executor has not, in his provisional account of the second of September, 1874, made provision for paying any thing to these appellants, or in any manner recognized their claims. They allege they are aggrieved by the order homologating the executor's account, and ask relief from this court. The objections urged against the notice of filing the account, we do not regard as having much weight. An inspection of the record shows that there is no note of evidence, and we find there was no evidence introduced to sustain the various items, amounting to \$678 50, grouped in the account as "amount privilege claims paid." This case, in some material points, resembles that of the succession of Ross, 21 An. 511. In that case, as in this, no oppositions were filed and no evidence presented in support of the account. We held in that case that under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. We think the ends of justice require that we should remand this case.

It is therefore ordered, that the judgment appealed from be annulled and set aside. It is further ordered, that this case be remanded to the court of the first instance for further proceedings according to law. The costs of this appeal to be borne by the succession.

No. 5408.

F. DUPIERRIS v. J. W. HALLISAY.—E. BENJAMIN & Co. Garnishees.

When a firm is cited as garnishees, the answer to the interrogatories made in behalf of the firm needs not be sworn to and signed by each member thereof. If the firm only is cited, the firm only is bound to answer, and any member thereof may make oath and sign the firm name. If the separate answer of each member be desired, citation must be addressed to and served on each member.

A PPEAL from the fifth District Court, parish of Orleans. *Cullom, J. A. & W. Voorhies*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

WYLY, J. Plaintiff having judgment against defendant, issued execution thereon and instituted this garnishment proceeding, by propounding certain interrogatories to the commercial firm of E. Benjamin & Co., the citation addressed to the firm being served personally on Louis Benjamin, one of the partners. The answer in behalf of the firm, was signed by E. Benjamin. A rule was made absolute taking the interrogatories *pro confessis* against Louis Benjamin, and condemning him to pay the amount of the *fieri facias*, because the latter failed to sign

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also an answer to the interrogatories for the firm. From this judgment Louis Benjamin appeals.

The question is, when a firm is cited as garnishees, must the answer to the interrogatories made in behalf of the firm, be sworn to and signed by each member thereof? We think not. If the firm only is cited, the firm only need answer, and any member thereof may make oath and sign the firm name. If the separate answer of each member be desired, citation must be addressed to and served on each member. See 10 An. 53; 25 An. 312.

It is therefore ordered that the judgment appealed from be annulled, and it is now decreed that the rule herein against Louis Benjamin be set aside and discharged; plaintiff paying costs in both courts.

Rehearing refused.

 No. 3586.

J. E. PRUDHOMME v. O. B. PLAUCHE et als.

The defense to the plaintiff's claim is the prescription of three and ten years. The relation of the parties was that of agent and principal, and the right of the planter to sue his factor for an account is only prescribed by ten years. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying, as to an open account.

APPEAL from the Second District Court, parish of Orleans. *Duvignaud, J. Hyams & Jonas*, for plaintiff and appellee. *Saucier & Michinard*, for defendants and appellants.

LUDELING, C. J. The defendants, factors or commission merchants, are sued for a balance in their hands in favor of their principal.

The answer is a general denial, and the plea of prescription of three and ten years. On the eleventh of November, 1861, accounts current were rendered and sent to plaintiff, showing a balance of \$10,501 53 in his favor, and on the twenty-eighth of December, 1865, the sum of \$1024 96 was paid on said account, and subsequently \$500 more were paid. This suit was instituted on the thirteenth of May, 1868.

The relations of the parties were that of agent and principal; and the right of the planter to sue his factor for an account is only prescribed by ten years. C. C. 3544. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying as to an open account.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 3940.

JOHN PEMBERTON et al., Administrators, v. JULES MAIGNAN.

Where parol evidence does not establish a debt against a dead person, but simply shows under what circumstances and for what purposes payments were made, it is admissible.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. Pitot*, for plaintiffs and appellees; *E. Bermudes*, for defendant and appellant.

MORGAN, J. This suit is instituted on four promissory notes for \$2500 each, dated June 8, 1863, and payable in one, two, three and four years, with interest from date. The defense is prescription.

On each of the notes payments of interest are indorsed which take it out of the statute of limitation.

Defendant, however, contends that he never authorized the indorsements to be made. He admits that he paid the money, but says in the absence of instructions the law would impute the payment to the first note. But the evidence is, we think, conclusive that the sums which he paid was in discharge of the interest which was due at the time payment was made. The evidence by which this was established was objected to because it was parol, but we think it was properly admitted. The testimony does not establish a debt against a dead person; it simply shows under what circumstances and for what purposes the payments were made. This, we think, can be established by parol.

Judgment affirmed.

No. 3636.

N. LOUQUE v. LOUISIANA LEVEE COMPANY.

The purpose of the laws is clearly, that the work of constructing, repairing and strengthening the levees shall be done under plans, surveys, measurements and directions to be furnished by a board or commission of engineers, for the appointment of which the law provides, and the Louisiana Levee Company will not be held responsible in damages to individuals except in certain cases and according to the provisions recited in section 5 of act No. 4, of the acts of 1871, page 33.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Charles Louque*, for plaintiff and appellant. *A. & W. Voorhies*, for defendant and appellee.

TALIAFERRO, J. The plaintiff, who owns a plantation in the parish of St. John the Baptist, near the point on the Mississippi river where a large crevasse in the levee occurred on the nineteenth of April, 1871, alleges that he sustained great damage and loss from the overflow of his plantation and consequent destruction of his crop that year, result-

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ing from the crevasse. He alleges that the loss and injury he has suffered arose from the culpable neglect of the Louisiana Levee Company in failing to cause the weak and defective condition of the levee at the place where the crevasse occurred to be repaired and strengthened in time before the rise of the river, so as to prevent the break that occurred and secure the adjacent plantations from being submerged with water. He estimates his loss at forty-nine thousand dollars, and brings this action to recover that sum from the Levee Company.

The answer is a general denial. The company specially deny that they were bound under their contract with the State to repair, strengthen or reconstruct, at the time alleged in the petition, the levee therein described, and that they are not answerable for the damages, if any, which the plaintiff may have sustained from the cause by him alleged.

There was judgment in the court below in favor of the Levee Company, and the plaintiff has appealed.

We find by referring to the laws passed in 1871 on the subject of levees, that the Louisiana Levee Company formed itself into a corporation, under the general laws of the State, on the eleventh day of February, 1871. Acts of 1871, p. 29. That this act was confirmed by the Legislature on the twentieth of February of the same year. Acts of 1871, p. 29. By the act approved February 20, section 2, p. 33, it is declared that "the Louisiana Levee Company shall take charge of, manage, control, construct, maintain, repair and keep in repair all the levees in this State on the Mississippi river, its tributaries and outlets," etc. In the following section, p. 34, it is provided that "said corporation shall have full right and authority, at all times to enter upon and occupy as far as necessary, by their surveyors and engineers, contractors, agents and servants, together with all necessary carts, animals, tools, materials and equipments, all such lands as may be necessary, and to remain as long as may be necessary for the purpose of doing and performing all and singular matters and things required to be done and performed in and about the inspecting, building, construction, maintenance, repairing and management of the levees as aforesaid," etc.

The powers granted to the Levee Company over the entire subject are ample and exclusive. But the purpose of the law is clearly that the work of constructing, repairing and strengthening the levees, shall be done under plans, surveys, measurements and directions, to be furnished by a board or commission of engineers for the appointment of which the law provides in act No. 4, acts of 1871, page 33. Section one recites, "that in order to maintain a uniform and perfect system,

the location and dimensions of all levees to be constructed, maintained, repaired, and kept in repair and managed, shall be determined by a commission of three engineers, to be appointed as follows, to wit: One by the Governor of the State of Louisiana, who is hereby authorized and directed to appoint said engineer within thirty days after the acceptance of the terms of this act by the said company as hereinafter provided; one by the Louisiana Levee company and one by the government of the United States. It shall be the duty of said commission, and they are hereby directed to determine the proper location and dimensions of all levees to be constructed, repaired or strengthened by the said corporation, and the standard of dimensions to which they shall be maintained by said company, and to report the same with maps and profiles thereof, and the number of cubic yards to be built in the construction of new levees, and in the strengthening, enlarging and repairing the levees now in existence, to the Secretary of War, the Governor of the State and the president of said company, which report shall be made in sections of five miles or more of said levees." Section four of the same act provides, "that said corporation shall, within sixty days from the receipt of the report of said commission, commence the construction of said levees," etc. Section five recites, "that on and after the completion of any and all sections of said levee, said company shall maintain the same up to the standard dimensions required by the report of said commission, and in the event of said corporation failing or neglecting to do so, it shall be liable in damages to any person or persons injured by such neglect and failure; provided, that said corporation shall in no case be liable where such injury shall be caused by, or said failure shall result from, acts of violence of men, the wrongful acts of individuals, the existence of obstacles interposed by the action of courts, or the operation of causes over which said company can have no control, or on account of the floods rising above the standard height determined by said commission."

The acceptance and ratification of the act forming the contract between the State and the company took place on the twenty-eighth of February, 1871. Acts of 1871—act 27, page 64.

Section ten of the act of twentieth February, 1871, page 37, clothes the company with the power of obtaining from a court of competent jurisdiction a writ of mandamus commanding any officer of the State who may fail, neglect or refuse to do any of the matters or things he shall be required to do by the provisions of this act, to do and perform the matter or thing so required of him.

We see then by a review of the several provisions of the acts relating to the construction and repair of the levees, that although the company is invested with very general control and management of

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the entire subject of levees, yet this general supervision and control is subordinated to those clauses and sections of the different acts which require the company to perform the work of constructing and repairing in conformity with the plans and directions afforded them by the Board of Engineers, after surveys and measurements made by them. An engineer, it is seen, was to be appointed within thirty days after the acceptance of the act by the company.

The acceptance was made on the twenty-eighth of February. The appointment then was to be made within thirty days or prior to the last day of March. But no engineer was appointed within the thirty days as required, nor was an appointment made until September following.

The crevasse took place on the seventeenth of April.

It seems clear that the company was at that time without power to act. No engineer was appointed. The Governor had the entire month of March within which to make the appointment, with the exception of the last day of that month. The company could only proceed by mandamus after the expiration of the thirty days within which the Governor had to appoint. Only twenty days intervened between the expiration of that delay and the occurrence of the crevasse. A reasonable time would have been required for the survey of the work and the report, before which the company could not proceed to execute the work. Within that brief space of time it is manifest the company could not, in pursuance of the rules and requirements of law, have performed the work. No responsibility, therefore, rested upon them for not repairing and strengthening the levee at the point where the crevasse happened.

The decree of the lower court we think correct.

Judgment affirmed.

Rehearing refused.

No. 5430.

CRESCENT CITY GASLIGHT COMPANY v. NEW ORLEANS GASLIGHT COMPANY.

The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and void. It is true, the right of the plaintiff to make and vend gas will begin on the first of April, 1875, but the right to sell shares of its capital stock, to the amount of three millions of dollars and the duty to erect works, buildings, machines, lay gas pipes, and prepare every thing necessary to begin the enterprise or business, vested the moment the corporation began.

A void title set up to defeat plaintiff's right to prepare for their business, invades their charter as effectually as if set up to obstruct the business after it had begun.

This is not an action of damages under article 2315 of the Revised Code. The plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, art. 21. The exception to the petition of plaintiffs on the ground that it discloses no ground of action can not be maintained.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first of April, 1875, is no more disclosed in the title of the act, entitled "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending gas is indicated therein. The prolonging of defendant's corporation for twenty years virtually gives a new charter for that period. Moreover, the title is deceptive and calculated to mislead the mind from the true object of the statute. Hence, the statute is repugnant to article 115 of the constitution of 1852 then in force and is therefore void.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895, and the act of March 1, 1860, which had that object in view, being unconstitutional, was utterly void from the beginning.

The act incorporating the plaintiff's company, conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years from the first of April, 1875, is not repugnant to article 114 of the constitution of 1868 then in force, requiring the object or objects of every law to be embraced in the title. The object of the act as stated in the title was: "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges. These powers and privileges need not be detailed. The title of the act disclosed the creation of a Gaslight Company. This was sufficient to cover the monopoly or exclusive privilege to make and vend gas.

An exclusive privilege or monopoly, can be granted under the usual title to incorporate a company. The grant of the monopoly complained of in this case does not violate the constitution, and is valid.

The State, intervening, not to set up some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant, in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing the intervention.

In regard to the intervention of the city of New Orleans, the right reserved by the State for it to become the purchaser of the gas works, fixtures, etc., at the expiration of the charter of the defendant, was not such a vested right that the State could not withdraw or recall, without contravening that provision of the constitution of the United States prohibiting a State from impairing the obligations of a contract.

Even conceding that the authority given to the city, if she saw fit, at the expiration of the defendant's charter, to purchase the gas works, by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived, and the grant of the right and exclusive privilege to plaintiff to make and vend gas, is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. This grant by implication revokes or recalls any previous authority given the city to buy the gas works of defendant on the first of April, 1875. This is violating no contract protected by the constitution of the United States. The intervention of the city can not be maintained.

Crescent City Gaslight Company v. New Orleans Gaslight Company.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. O. Gibson, H. O. Dibble, Randolph, Singleton & Browne, Kennard, Howe & Prentiss*, for plaintiff and appellant. *J. A. Campbell, Semmes & Mott*, and *Randell Hunt*, for defendant and appellee. *J. B. Cotton* and *A. P. Field*, Attorney General, for the State of Louisiana, intervenor and appellant. *George S. Lacey*, city attorney, and *F. K. Butler*, for the city of New Orleans, intervenor and appellant.

WYLY, J. The important questions presented in this case are the following:

First—Does the petition disclose a cause of action?

Second—Is the act of March 1, 1860, extending the charter of the New Orleans Gaslight Company, as now established by law, from first April, 1875, until first April, 1895, repugnant to articles 115 and 116 of the constitution of 1852, requiring the object of every law to be expressed in the title, and prohibiting the revival or amendment of a law by reference to its title?

Third—Are the acts of twentieth April, 1870, and tenth July, 1873, incorporating the plaintiff company and conferring on it the sole and exclusive privilege of making and vending gas in the city of New Orleans for fifty years from the first April, 1875, repugnant to article 114 of the constitution of 1868, requiring the object of every law to be expressed in the title, and likewise repugnant to said constitution, in so far as the said act creates a monopoly in favor of plaintiff. Other questions arise in regard to the rights of each of the intervenors which will be stated hereafter.

In order to determine whether the plaintiff discloses a cause of action it will be necessary to consider the allegations of the petition, which for the purpose of the inquiry must be taken as true.

Plaintiff alleges that by the act approved April 1, 1835, the defendant obtained from the State of Louisiana a charter, amended March 10, 1845, and also on fifteenth March, 1854, conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for forty years, or until first April, 1895, "at which period all the corporate privileges of said company shall expire; that the defendant, the New Orleans Gaslight Company, has continued to enjoy all of the franchises aforesaid until now; that plaintiff, the Crescent City Gaslight Company, obtained from the State of Louisiana by act of April 20, 1870, a charter, amended July 10, 1873, granting to it the sole and exclusive privilege of making and vending gas in the city of New Orleans for fifty years, from first April, 1875, the period at which defendants' corporate privileges expire, according to the terms of its charter, granted in 1835. Petitioner further shows that the act approved March 1, 1860, entitled "An Act to extend the area

of gas lighting in the city of New Orleans, and to reduce the price now paid by gas consumers," which act provides that the charter of defendant, "the New Orleans Gaslight Company, as now established by law, shall remain in full force and effect until the first day of April, 1895," is unconstitutional and void, and no rights accrued to defendant thereunder, because said act was passed in violation of articles 115 and 116 of the constitution of 1852, then in force; nevertheless, petitioner shows and avers that the New Orleans Gaslight Company aforesaid has been assuming that its said charter will not expire until the first day of April, 1895.

Petitioner now further shows that the Company, plaintiff, in order to avail itself of the exclusive privilege to make and vend gas in the city of New Orleans, from and after the first day of April, 1875, as aforesaid, granted by the 8th section of plaintiff's charter, as aforesaid, will be obliged to expend large sums of money, exceeding one million of dollars, in the erection of suitable works, buildings, fixtures, machines, etc., etc., and in laying mains, pipes, etc., etc.

Petitioner shows that it will be necessary to commence the construction of such works at once, in order to be ready to deliver gas at the time fixed when the privileges of the Company will commence. Petitioner shows that it is of paramount importance, both to plaintiff and the public, that the said works and preparations shall be so completed, and that if the Company is prevented from so completing its works before the first of April, 1875, it will suffer irreparable loss.

Petitioner now further shows and avers, that the assertions and claims of the New Orleans Gas Light Company to the pretended extension of its charter for twenty years beyond the first day of April, 1875, as aforesaid, is a slander upon the title of plaintiff, to the rights and privileges in its charter contained, as hereinbefore set forth. Petitioner further shows that the said pretensions and claims of the said New Orleans Gas Light Company are calculated to, and do impair the value of plaintiff's charter, and the credit of the company, and are calculated to, and do impede the company in its efforts to complete the necessary preliminary works, as aforesaid, and thereby cause plaintiff damages largely in excess of five hundred dollars, and work plaintiff an irreparable injury.

Petitioner still further shows that unless the pretended extension of the charter of the said New Orleans Gas Light Company, can be adjudged null and void, and unless the said company shall be forbidden by decree of court from asserting such pretensions, and thus the cloud be removed from the title of plaintiff's charter, plaintiff will suffer still greater damage and irreparable injury; all of which can, and will be fully and specially shown on the trial.

Finally petitioner shows that a writ of injunction is necessary to prevent the New Orleans Gas Light Company and its officers and directors from asserting any right or claim, to make and vend illuminating gas, in the city of New Orleans, from and after the first day of April, 1875, the date of the expiration of the charter of the said company, as aforesaid.

The relief prayed for under the foregoing allegations is, that the plaintiff be decreed to have the sole and exclusive privilege to make and vend illuminating gas in the city of New Orleans for fifty years from first April, 1875; that the act of March 1, 1860, extending defendant's corporate life and privilege to make and vend illuminating gas in New Orleans from first April, 1875, until first of April, 1895, be decreed unconstitutional and void, and that the defendant be enjoined, restrained and prohibited from assuming or claiming in any manner the right to make and vend illuminating gas after the first April, 1875, or from attempting to continue to make and vend it after said date.

It appears from the foregoing allegations, which must be taken as true, that the plaintiff, under its charter or contract with the State, has undertaken to begin on the first April, 1875, the large business of making and vending gas in the city of New Orleans, an enterprise exclusively confided to it; that in order to commence operations at said time, suitable works, buildings, fixtures, machines, the laying of gas pipes, etc., have to be constructed, involving an expenditure of large sums of money, exceeding one million of dollars; that if said works and preparations are not completed for the manufacture, sale and delivery of gas by that time, both the plaintiff and the public will suffer irreparable loss; that the assertions, pretensions and claims of defendant that its charter was continued for twenty years from first April, 1875, by act of March 1, 1860, which is void for unconstitutionality, are calculated to and do impair the value of plaintiff's charter and the credit of the company, and are calculated to and do impede the company in its efforts to complete the necessary works as aforesaid, thereby causing large damages to plaintiff; and that said unfounded pretensions will continue to work plaintiff irreparable injury, unless said act of March 1, 1860, be decreed unconstitutional and void, and the defendant be inhibited from setting up rights thereunder; that the plaintiff is entitled to the use of its credit in raising funds to construct the large works, and make the preparations necessary to begin the manufacture and sale of gas on first April, 1875, can not be doubted; and that it is injured by the pretensions of defendant, founded on the act of March 1, 1860, claimed to be void, is equally certain. If the plaintiff is injured to the extent claimed, and is crippled by the loss of its credit, so as to be impeded in carrying out its contract

with the State, by the pretensions and claims of defendant, founded on the act of March 1, 1860, which is alleged to be unconstitutional and void, the question is, can this court redress the wrong of which the plaintiff complains and give the relief prayed for in the petition?

We think that it can. Article 10 of the constitution provides that: "All courts shall be open, and every person shall for injury done him in his land, goods, person, or reputation, have adequate remedy by due process of law and justice administered without denial or unreasonable delay." "In all civil matters where there is no express law the judge is bound to proceed and decide according to equity." * * * Revised Code, article 21.

The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and void. It is true the right of the plaintiff to make and vend gas will begin on first April, 1875, but the right to sell shares of its capital stock to the amount of three millions of dollars, and the duty to erect works, buildings, machines, lay gas pipes, and prepare every thing necessary to begin the enterprise or business, vested the moment the corporation began. Indeed all of plaintiff's franchises vested from the moment the grant was made by the State, the exercise of the right, however, to make and vend gas being postponed till first April, 1875.

If the claims and pretensions of defendant, founded on a void statute, destroy the credit of plaintiff so that its shares of capital stock can not be sold, or funds raised, in order to construct the necessary works to begin the business of gas making by the time stipulated in the charter, are not the rights of the plaintiff, to that extent, invaded? If these unfounded claims and pretensions hinder or prevent the plaintiff from getting ready to begin business on the first April, 1875, is not an injury sustained on account thereof?

Not only plaintiff's right to sell shares of its capital stock is invaded, but, practically, all the privileges conferred by the charter are defeated, because plaintiff is stripped of the means necessary to begin the business contemplated by the grant. The plaintiff has as much right to use the means authorized by the charter to make its preparations, as it will have to pursue the business when the preparations are made; and an invasion of the one ought to be redressed as well as an invasion of the other. A void title set up to defeat plaintiff's right to prepare for the business, invades the charter as effectually as if set up to obstruct the business after it has begun.

It is urged, however, that this is not one of the actions mentioned in the Code of Practice. The authors of our laws have not seen fit to prescribe forms for every legal demand, and they have not catalogued

in the Code of Practice all the actions that may be brought in our courts; it is, perhaps, well that they have not done so, lest by the omission of a form, substantial relief in some case might be denied to a person whose rights have been invaded. The learned counsel of defendant insist that as their client had reasonable cause to believe that its claim, founded on the act of March 1, 1860, is valid, there is no cause for an action of damages on account of the assertion thereof; that their client committed no fault, which is essential to recovery of damages, under article 2315 of the Revised Code, which declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." * * * And citing a case in 11 An. to the effect that "when there is no fault there can be no actionable damage," they conclude that no *jus* or right of the plaintiff has been invaded, and no relief should be granted by the court.

The fallacy of the reasoning consists in the assumption that this is an action of damages under article 2315 of the Revised Code, and because it does not properly lie there, no right of the plaintiff has been invaded and no relief can be granted.

In our opinion the plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, article 21; *Marbury v. Madison*, 1 Cranch 177; *Dodd v. Benthal*, 4 Heiskal 602; *State v. Patterson*, 34 N. J. Law, 163; *State v. Jersey City*, 34 N. J. Law 390; *Story's Equity Jur.*, page 31; *Broom's Legal Maxims*, 180; *Hillard on Injunctions*, 550; *England v. Lewis*, 25 Cal. 357; *Evans v. Merchants' Bank*, 51 Mo., 345; 22 *Missouri* 348; see also *Osburn v. The Bank of United States*, 9 *Wheaton* 742.

If, however, the cause of action were doubtful, we would feel inclined in view of the public interest involved in the issues herein, to maintain the suit and proceed with the trial on the merits. As the learned judge *a quo* well remarks in his written opinion, the making and vending of gas for the public in New Orleans, is something in which the community at large are interested, and they are concerned in having the opportunity to obtain gas secured to them beyond dispute or doubt. If, therefore, it should be found that the right of the defendant to make and vend gas under existing legislation, ceases on the first of April, 1875, and that right is given exclusively to the plaintiff, then it might happen in case of the postponement of the questions at issue until that date, that the city of New Orleans would be left in darkness for a time for want of the necessary preparations on the part of the lawful agent of the State to make it. We therefore conclude that the exception, that the petition discloses no cause of action, can not be maintained.

We now come to the question : Is the act of first March 1860, extending the charter of the New Orleans Gaslight Company, as now established by law, from first April, 1875, until first April, 1895, repugnant to the articles 115 and 116, constitution of 1852, requiring the object of every law to be expressed in the title, and prohibiting the amendment of a law by reference to its title.

The title is : "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers."

Section one provides : "That the charter of the New Orleans Gaslight Company, as now established by law, shall remain in full force and effect until the first day of April, 1895 ; provided that nothing contained in this act shall be construed so as to continue the exclusive privilege granted to said company beyond the period fixed by its present act of incorporation." * * * It also contains clauses reducing the price of gas to \$4 per one thousand cubic feet, and requiring within three years the said company to lay down not less than fifteen miles of main pipes through the four districts of the city, according to their respective wants, and also requiring it to lay down, free of charge, the main pipes necessary for lighting the levee or river front of the city whenever required to do so by the Common Council.

Section two provides : "That the New Orleans Gaslight Company shall have the power to increase, from time to time, the capital stock of said company, as the board of directors may determine, to an amount which shall not exceed one million of dollars."

Section three provides that the act shall not take effect until it is accepted by not less than two-thirds of the stockholders. The object of the act was doubtless to give the defendant an extension of its charter for twenty years from first April, 1875, and that really was the grant made by the State ; the motive or inducement for making it being the advantage contemplated to accrue to the people of New Orleans by having gas extended over a greater area, and supplied to them at a cheaper rate. This object is not embraced in the title. No hint or clue is given ; nothing is suggested in the title indicating the purpose to prolong the period of duration of the charter of the New Orleans Gaslight Company, which had not then expired by fifteen years. The company is not named in the title.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first April, 1875, is no more disclosed in the title—"An act to extend the area of gaslighting in the city of New Orleans, and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending of gas is indicated therein. And who doubts that the area of gaslighting could be extended, and the rate of selling it be reduced, as well

by creating one or several new corporations to operate gas works and to compete in carrying on the business? Yet, if under this title one or several corporations had been created for the purpose of operating gas works for twenty years, or for any period, could it be said that such a purpose, the creation of a corporation, was disclosed in the title? And the prolonging of defendant's corporation for twenty years, virtually gives it a new charter for that period. Moreover the title is deceptive, and calculated to mislead the mind from the true object of the statute. No member of the General Assembly at the time the bill was about being passed, on hearing the title read, would have supposed that its object was to obtain from the State a grant extending the charter of the New Orleans Gaslight Company for twenty years, or until first April, 1895. A member who would object to extending the charter, might readily consent to a reduction of the price of gas and to the extension of the area supplying it. We therefore conclude that the act of March 1, 1860, extending the charter of the New Orleans Gaslight Company, as now established by law, until the first day of April, 1895, is repugnant to article 115 of the constitution of 1852, then in force, and is therefore void. 4 An. 298; 5 An. 96; 23 An. 720; Cooley on Limitations, 141, 150; 14 Indiana 195; Adams v. Webster, and Morrison v. Larkin, 26 An. 699.

It is urged, however, that whether the act of 1860 is constitutional or not, it was a contract that has been duly accepted by the parties; that the defendant in performance of the requirement thereof has extended the area and reduced the price of gaslights in the city of New Orleans; that the State, after receiving the benefits of the contract, can not deny the validity thereof; and that the plaintiff, the grantee of the State, is estopped by the act of its grantor from disputing the rights of the defendant, arising under said statute. This argument is unsound. The defendant was charged with notice that the Legislature was prohibited from passing an act or granting a charter in contravention of article 115 of the constitution; and the statute in question, passed in violation thereof, was utterly void from the beginning.

If the statute was void, the grant therein to the defendant, prolonging its charter for twenty years, was invalid; and no subsequent act of its own could cure the infirmity or operate an extension of its charter, because a creature can not be its own creator. And no act of the General Assembly could cure the defect or prolong the charter, unless done in the manner prescribed by the constitution and not in violation thereof.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895; and as before remarked, the act of March 1, 1860 being unconstitutional, was utterly void

from the beginning. Cooley's Constitutional Limitations, 188; 25 Missouri 341; 2 Dal. 308; 1 Cranch 137; 5 M. 581; 3 Allen 407; 29 Missouri 593; Marsh v. Fulton County, 10 Wal. 677; 3 An. 295; Dillon on Municipal Cor., 2d ed. sec. 17; 22 An. 402; 5 Mason 441; 4 Cal. 51; 10 Iredell 112; 4 Hawkins 132; 1 Sum. 278; State ex rel. Smith v. Dubuclet, State Treasurer, 23 An. 267.

We come now to the question whether the acts incorporating the plaintiff's company and conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years, from first April, 1875, are repugnant to article 114 of the constitution of 1868, then in force, requiring the object or objects of every law to be embraced in the title. And here the main objection is as to the title of the act of twentieth April, 1870; that its title, "an act to incorporate the Crescent City Gaslight Company," does not cover the monopoly contained in the eighth section thereof; that there is nothing in it indicating the purpose to grant the sole and exclusive privilege to make and vend gas in the city of New Orleans for fifty years from first April, 1875. To this the plaintiff replies that under a similar title, a monopoly of the same kind was granted to the defendant in the charter of 1835, which was recognized by this court in the case of Paulding, 12 Rob. 378, and which has been enjoyed by the defendant for nearly forty years, without its validity having been questioned by any one. But the object of the act, as stated in the title, was "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges; those powers and privileges need not be detailed, for if they were, the title would be as long as the act. The title of the act disclosed the creation of a gas company; this was sufficient to cover the monopoly or exclusive privilege to make and vend gas.

The precise question was before this court in *The Louisiana Lottery Company vs. Richoux, et al.* 23 An. 743, and also in the *State ex rel. Belden vs. Fagan*, 22 An. 546, where it was held, that an exclusive privilege or monopoly could be granted under the usual title to incorporate a company. And in these decisions it was held, that the State could create a monopoly; that it could give the Crescent City Slaughterhouse Company the exclusive privilege to keep a slaughterhouse; and, that it could confer on the Louisiana Lottery Company the exclusive privilege to sell lottery tickets.

However odious monopolies may be, the sole question for the court to determine in this case is, had the Legislature the power under the constitution, to grant the plaintiff the sole and exclusive right to manufacture and sell illuminating gas in the city of New Orleans for fifty years? If they had the power, they can not be controlled by the judi-

cial department in the exercise thereof, however unwisely they have chosen to employ it. Their responsibility is not to the court, but to the people, whose agents they were, for this unwise, unfair and arbitrary exercise of the power of legislation confided to them. In its own sphere, the legislature is supreme, except when restricted by the constitution of this State or of the United States. 9 R. 411; 9 An. 562; 11 An. 308, 338, 370; 12 An. 169, 554. See also 16 Wal. 36.

Now, what clause of these constitutions has been violated in the case at bar? Is the bill of rights: all persons "shall enjoy the same civil, political and public rights and privileges, and be subject to the same pains and penalties," in any manner invaded? Is "life, liberty, or the pursuit of happiness" of any person in the city of New Orleans, assailed by the statute, granting the sole and exclusive privilege to plaintiff to operate gas works in New Orleans for fifty years? The right to operate gas works and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State and in the exercise of the police power, the State could carry on the business itself, or select one or several agents to do so. And, as the legislature had the right in 1835, to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the legislature of 1870, had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We therefore conclude that the grant of the monopoly complained of, does not violate the constitution and is valid. 22 An. 553; 16 Wallace, 36; 23 An. 743. See also *Corfield vs. Coryell*, 4 Wash. C. C. Rep. page 380; also, *Dillon on corporations*, sections 546, 549.

We come now to consider the rights of the intervenors. Without going into details, we conclude that the State intervening, not to setup some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant, in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing its intervention.

In regard to the intervention of the city of New Orleans, we will remark, that the right reserved by the State for it to become the purchaser of the gas works, fixtures, machines, pipes etc., at the expiration of the charter of the defendant, was not such a vested right that the State could not withdraw or recall, without contravening that provision of the constitution of the United States, prohibiting a State from impairing the obligations of a contract. Conceding that the authority given

to the city, if she saw fit, at the expiration of defendant's charter, to purchase the gas works, by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived. And the grant of the sole and exclusive privilege to plaintiff to make and vend gas, is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. And, this grant by implication, revoked or recalled any previous authority given the city to buy the gas works of the defendant on the first of April, 1875, for the purpose of making and vending gas.

The powers and privileges granted by the State to the city of New Orleans, and other political corporations used in the administration of government, may be recalled or modified by the legislature at pleasure. And in doing so they violate no contract protected by the constitution of the United States. Impressed with this view of the law, this court in 1850, in the case of the police jury of Bossier parish vs. corporation of Shreveport, 5 An. 664, decided that "the act of twentieth of March, 1839, incorporating the town of Shreveport, and giving the municipal authorities exclusive right to establish ferries across Red river, did not create a contract or vested rights in that corporation which the legislature could not constitutionally change or annul."

And this doctrine was reaffirmed by this court in the case of Marks vs. The Town of Donaldsonville, 24 An. 242. See also, the case of Layton vs. City of New Orleans, 12 An. 515. Dillon on Corp. 2d ed. 37, 40; 11 Peters, 539; 3 How, 534. We therefore conclude that the intervention of the city of New Orleans can not be maintained.

It is therefore ordered that the judgement herein be set aside and annulled and it is decreed, that the plaintiff, the Crescent City Gaslight Company, has the sole and exclusive right to make and sell illuminating gas in the city of New Orleans, for fifty years from first April, 1875; that the act of March 1, 1860, extending the charter of the defendant, the New Orleans Gaslight Company, from first April, 1875, until first April, 1895, is unconstitutional and void; and that the defendant be enjoined and inhibited from setting up any claim thereunder or from attempting to carry on the operation of gas works or the business of making and vending gas after first April, 1875, or from, in any manner, impeding the plaintiff from the full enjoyment of its franchises, rights, and privileges, arising under the acts of April, twenty, 1870, and July 10, 1873. It is further ordered, that the intervention of the State be dismissed with costs, and the demand of the intervenor, the city of New Orleans, be rejected with costs of its intervention. It is further ordered, that the defendant pay costs of both courts.

HOWELL, J. Absent.

Davidson & Hill v. Bodley.

No. 5388.

J. DAVIDSON & HILL v. THOMAS B. BODLEY, NORWALK IRON WORKS, Intervenor.

The note sued upon having been given subsequently to the date of a written contract and identified therewith in its own terms, it was proper to permit parol evidence to show the settlement or agreement under which it was given. The plaintiffs are not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of a change in the sum first agreed on, and is binding on defendant in the absence of error or fraud.

The defendant being the agent of the intervenors and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery delivered to them, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained. The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any. The principle which sustains the pledge as collateral, which is placed in the hands of a broker to sell, must apply here.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. B. E. Forman, Ogden & Hill*, for plaintiffs and appellees. *Hornor & Benedict, F. N. Baker*, for defendant and appellant. *Fellows & Mills*, for intervenor and appellant.

HOWELL, J. Plaintiffs sue on a note given by defendant for one-half of advances made by the former in excess of or beyond what was repaid from a certain source, under a contract for raising a stranded vessel. The defense is failure of consideration and release of liability by the raising of said vessel, an event, by the happening of which, it is alleged, the defendant would not be liable.

A contract was entered into between the agents of Charles Morgan and one John Halliday, by which the latter was to raise a stranded vessel for a stipulated sum. Another contract was made between the plaintiffs and defendant, by which the latter bound himself to pay one-half of a fixed sum, advanced by the plaintiffs beyond the amount received from the Halliday contract. This sum was subsequently increased, and before the vessel was raised, and while it seemed uncertain whether it would be, these parties came to an understanding as to the amount of the excess advanced by plaintiffs for the object of the original contract, and the note in suit was given by the defendant for his portion. The evidence by parol to show this was objected to on the ground that no new verbal agreement was alleged, and the written contract was limited to a less sum. The note having been given subsequently to the date of the written contract and identified therewith in its own terms, it was proper to permit evidence to show the settlement or agreement under which it was given. The plaintiffs were not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of another change

in the sum first agreed on, and is binding on defendant in the absence of error or fraud, which is not shown.

The Norwalk Iron Works intervened, claiming the ownership of certain machinery pledged by defendant to plaintiffs to secure said advances, and have appealed from a judgment against them. The evidence shows that the defendant was their agent to sell the machinery, consigned by them to him, and that he sent machinery to various points, to be sold for cash or on credit, and settled with intervenors for such sales. He was their agent and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery in question, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained.

The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any.

The principle which sustains the pledge of a note as collateral, which is placed in the hands of a broker to sell, must apply here.

It is therefore ordered that the judgment appealed from be amended by changing the amount as against the succession of the defendant from \$2000 to \$2501 15, with five per cent. interest from eighteenth March, 1872, and as thus amended it be affirmed with costs.

Rehearing refused.

No. 5371.

SUCCESSIONS OF JOHN AND MARY TRAINOR.

This is a suit to force compliance with the terms of adjudication of property. The defense is want of title in the seller, the administrator of the Trainor estate. Trainor bought the lot about which the dispute is as to title, at a tax sale made in August, 1860, at the suit of the city of New Orleans, for city taxes. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The provisions of these acts not having been complied with in the tax sale, it follows that the evidence does not establish a valid title in the succession of Trainor.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Gilmore & Sons*, for plaintiffs and appellants. *Alfred Grima*, for respondent and appellee.

TALIAFERRO, J. The administrator caused property of the estate to be sold. John Hearne, the defendant in this suit, bought three lots of ground, with the buildings and improvements upon them. The terms were cash in hand; these lots were separately adjudicated to him at the price of \$1000 each. Failing to comply with the terms of sale, a rule was taken upon him to show cause why the property should not be sold at his *folle enchere*. He set up in his defense that, as to one of the lots the succession was without valid title, and could not confer a

title on him; that the other lots were so situated that the buildings on the rear part of them were inaccessible from the street, except by an alleyway taken off one side of the lot to which the estate had no title, and as his inducement to bid for the rear lots was, that the buildings upon them could be used by means of the alleyway leading to the street, they would be of no practical use to him if deprived of the first or front lot by the true owner. On trial of the rule judgment was rendered in the defendant's favor, and the administrator appealed.

Trainor, it appears, bought the lot about which the dispute is as to the title, at a tax sale made in August, 1860, at the suit of the city of New Orleans for city taxes. The record of the tax suit in which the property was sold was introduced in evidence. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The second section of the act No. 85 of 1858 provides: "That the tax receipt or receipts of each delinquent tax payer shall, after the expiration of thirty days' publication referred to in the preceding sections, be severally stamped by the city treasurer with the words 'published according to law,' and shall from that time become an executory process against the party owing the tax, on which it shall be the duty of any judge of competent jurisdiction, as soon as applied to, to enter up judgment and grant a writ of seizure and sale against the property, * * * as in all other cases of seizure and sale provided for by the laws of the State." The tax bill does not show the placing upon it of the treasurer's stamp. The tax receipt was made out in the name of "Widow Lanahan," and the suit was brought against her. The notice of service is also addressed to Widow Lanahan, and the sheriff returned it with service made on "Peter Leslie, tutor of the minor heir of Widow Lanahan, deceased."

On the part of the administrator it is answered, that the tax sale was in the nature of a proceeding *in rem*, and the regularity of the proceedings is presumed by law; that the sale could only be impeached by direct action of nullity at the suit of the party aggrieved, in which restitution of the price and the value of the improvements would be a condition precedent to the maintenance of the action, referring to *Barrelli v. Gauche*, 24 An. 324, and *Shields v. Lafon*, 7 An. 135-6. It is shown on the part of the administrator that Trainor was in uninterrupted possession of the lot in question from the day of the sale to the time of his death, a period of fourteen years. Lastly, it is contended that the act of 1873, No. 101, relieves all purchasers of real estate sold at public auction to satisfy judgments for State, parish or municipal taxes, and renders valid and perfects their titles after judicial possession of the property purchased for two years under deed of sale duly recorded.

We are of the opinion that the evidence does not establish a valid title in the succession of Trainor, and that the judgment of the lower court should be affirmed. See case of Dupre v. Thompson, sheriff, et al., and cases there cited, 25 An. 504.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 3255.

*E. W. BURBANK v. C. A. AND L. L. CONRAD.

As Charles M. Conrad was an offender of a class mentioned in the act of Congress of the seventeenth of July, 1862, entitled an act to suppress insurrection, etc., this statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. By the decree of condemnation of the third of February, 1863, only such right or title as the said offender had, passed to and vested in the United States, and this was the title conveyed to plaintiff by the Marshal's sale on the twenty-ninth of March, 1865.

But Conrad, at that time, had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself, although the act was registered only in 1870 in the parish of Orleans, where the property is situated. Hence the United States acquired no title and could not convey any to plaintiff.

In regard to the property confiscated, the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale, who is induced to buy the property standing on the public records in the name of the defendant in execution.

The failure of defendants to record their title in the parish of Orleans as required by the registry laws of the State, subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was nevertheless in them from the time of the sale, and neither their vendor nor his heirs could recover it from them.

As to the United States it was immaterial whether defendants had recorded their title or not; the property in question belonged to them and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Charles M. Conrad for offenses committed by him. The defendants were not parties to these proceedings and their title to the property could not be divested by the decree of condemnation.

APPEAL from the Fifth District Court, parish of Orleans. *Leau-mont, J. Fellows & Mills*, for plaintiff and appellee. *C. M. Conrad*, for C. A. Conrad, defendant and appellant. *C. A. Conrad*, curator *ad hoc*, for L. L. Conrad, defendant and appellant.

WYLY, J. The plaintiff who purchased an undivided half of a warehouse and lot on Julia street, at a sale made by the marshal under a writ of *venditioni exponas*, issued by the United States District Court in the confiscation proceedings of the United States v. Ten Lots of Ground alleged to be the property of Charles M. Conrad, brought this suit against the defendants, the owners of the other half of said property, for a partition thereof. Alleging that said property can not be divided in kind without deterioration of value, he prays for a partition by licitation.

The court rendered the judgment prayed for, and the defendants appeal.

Several interesting questions are presented in this case. One is: Assuming that the plaintiff bought at said sale, and the property so acquired belonged to Charles M. Conrad at the time it was condemned by decree of the United States District Court, under proceedings based on the act of July 17, 1862, commonly known as the confiscation act, did the estate so acquired confer on the plaintiff the right to demand of the defendants, who are admitted to be the owners of the other half of the property, a partition by licitation?

In other words, did the title acquired under said confiscation proceedings (which have frequently been held only to convey the life estate of the party accused) give the plaintiff the right to demand of the defendants, the admitted co-proprietors, the sale of the thing held in common, and a division of the proceeds?

Another, and the most important question in the case, is: Did the decree of condemnation and the sale by the marshal convey any title whatever to the plaintiff in and to the undivided half of said property, in view of the fact that prior to said confiscation proceedings, and prior to the act of July 17, 1862, authorizing it, Charles M. Conrad had by notarial act in the parish of St. Mary, on the third June, 1862, sold and conveyed said property to the defendants, the deed, however, although recorded in the parish of St. Mary, not having been registered in the parish of Orleans until long after said confiscation and sale?

As the view we have taken of this question will dispose of the case, we will confine our investigations to it.

And here we will remark that the act of July 17, 1862, "An Act to suppress insurrection, to punish treason and rebellion, to *seize and confiscate the property of rebels*, and for other purposes," was not intended to confiscate the property of rebels generally; but its operation was expressly confined to the property of persons of the class mentioned in the fifth and other sections; it was only the property of such persons that the act proposed to confiscate. The language is, "that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States."

As Charles M. Conrad was an offender of a class mentioned, the statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. *Bigelow v. Forest*, 9 Wal. 347.

By the decree of condemnation of the third of February, 1865, only

such right or title as the said offender had passed to and vested in the United States, and this was the title conveyed to the plaintiff by the marshal on the twenty-ninth March, 1865. But Conrad at that time had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself. When this law was brought to bear against Charles M. Conrad, the object was to punish an offense committed by him subsequent to the enactment thereof, and the penalty was to vest in the United States the property of the offender during the period of his life.

The confiscation of the property in question was not intended by the law, for it could inflict no punishment on Conrad, the alleged offender, because for a valuable consideration he had already sold it to the defendants, and as between the parties, without registry, the sale was perfect from the time of the execution thereof. Revised Code, 2456.

In regard to this property the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale who is induced to buy the property standing on the public records in the name of the defendant in execution.

The failure of defendants to record their title in the parish of Orleans, as required by the registry laws of the State, subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was, nevertheless, in them from the time of the sale; and neither their vendor nor his heirs could recover it from them. If he was honest and owed no debts their title was safe; if the purchasers wished to avoid these contingencies, a compliance with the registry laws of the State would have given them ample protection.

As to the United States, it was immaterial whether the defendants had recorded their title or not; the property in question belonged to them, and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Conrad for offenses committed by him.

Assuming the theory of the plaintiff to be true, that the United States occupied the position of a third party in the sense of the statute and jurisprudence of this State, and therefore the failure of the defendants to comply with our registry laws subjected the property in question to the decree of condemnation as the property of Charles M. Conrad, the effect will be that the plaintiff will hold it during the life of the offender, and then it will not pass to his heirs as the law of July 17, 1862, contemplates. It can never pass to the heirs of Charles M. Conrad, because heirs can only inherit what belonged to the deceased,

and by succession they only succeed to his property. The property in question passed out of Charles M. Conrad when the notarial act of June 3, 1862, was executed, and this act will be binding on his heirs whether recorded or not; but the deed was recorded in the parish of Orleans on the eighth December, 1870.

The fee or title of the property is beyond doubt in the defendants, and was at the time of the confiscation proceedings and before; and when the life estate of Charles M. Conrad owned by the plaintiff (if, under the circumstances, such could exist), is carved out, or has terminated, the defendants will recover the property not as heirs, but as vendees of Charles M. Conrad. And the anomaly presented is, that the plaintiff, claiming the life estate of Charles M. Conrad by virtue of the proceedings and sale under act of July 17, 1862, here sues the defendants, in whom the fee or title of the property is vested, for a partition by licitation; that is, for a sale of the thing and a division of the proceeds. And this life estate, assimilated by this court to the servitude of usufruct under our law, is fixed as the property in question in a proceeding to which its owners, the defendants, were not parties.

To fix this servitude on the property, of what avail was it that Charles M. Conrad was constructively before the court at the time of the decree of condemnation? He was not the owner. Its condemnation did not affect him, even as a warrantor. It was the defendants alone who could be affected by the forfeiture of the property, and as they were not parties to the proceedings, their title to the property was not divested by the decree of condemnation. And the plaintiff, in buying from the marshal, was not in the position of a bidder at a sale under execution for property standing on the public records in the name of the defendant in execution.

He is charged with notice of the character of the decree under which the sale was made, that it was a confiscation sale, and he was bound to know its legal effect. *Bigelow v. Forrest*, 9 Wal. 347. He bought only the title of the United States, which was not valid as regards the defendants. Our conclusion is, that the property in question belongs to the defendants, and the plaintiff has no right to demand a partition thereof.

It is therefore ordered that the judgment herein be set aside and annulled, and it is decreed that plaintiff's demand be rejected, and that the defendants have a valid title to the property described in the petition, and that they be put in possession thereof.

It is further ordered that plaintiff pay costs of both courts.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

No. 5151.

CITY OF NEW ORLEANS v. PIERRE CAZELAR.

The title to the act No. 7 of the extra session of 1870, is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and, as a consequence, the prescribing of the city limits or boundaries.

Cities may properly be extended in their boundaries as need or convenience may require.

The extension of their boundaries may, as in the present case, include rural districts, the condition of which is very materially different from the character of city property.

Taxation must be equal and uniform, but the ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least a difficulty that is never clearly and satisfactorily removed.

The principle is well settled and the doctrine established, that a Legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike.

The tax in dispute in this case has been imposed since the city charter of 1870, which makes it the duty of the City Council to lay an equal and uniform tax upon all real and personal property in said city.

From these well settled principles and the law applicable to this case, it must be concluded that the objections urged against the constitutionality and legality of the tax in question are untenable.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. G. S. Lacey*, city attorney, for plaintiff and appellant. *O. E. Schmidt*, for defendant and appellee.

TALIAFERRO, J. The city of New Orleans claiming from the defendant taxes to the amount of \$405, he refuses to pay them on constitutional grounds, alleging that the act of the Legislature, approved March 16, 1870, entitled "An Act to extend the limits of the parish of Orleans," etc., approved March 16, 1870, being act No. 7 of the extra session of 1870, as well as the act amending the same approved March 13, 1871, upon which the city bases its right to tax his property is, so far as relates to the power and right set up to impose the tax sought to be enforced against him, unconstitutional and void.

First—Because the object and purpose of the Legislature to extend the limits of the city of New Orleans, so as to embrace therein the entire area and territory of the parish of Orleans, and so as to bring within the limits of said city that portion of said parish in which the property of the respondent is situated, is not expressed in the title of either of the aforesaid acts, as required by article 114 of the State constitution.

Second—Because the said property of respondent is not city property, but is partly vacant land and partly a cultivated farm occupied by respondent for agricultural purposes, and is not required for either streets or houses or other purposes of a town or city, and by the aforesaid legislative act No. 7 of the extra session of 1870, the said property has been brought within the taxing power of the city of New Orleans by an enlargement of its limits, solely for the purpose of increasing its

revenues; that legislation of this kind is the taking of private property and the divestiture of vested rights without compensation, and is violative of article 110 of the State constitution and of article 5 of the amendments of the constitution of the United States.

On trial of the case in the lower court there was judgment in favor of the defendant, and the plaintiff appealed.

We think the title to the act No. 7 of the extra session of 1870 is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and, as a consequence, the prescribing of the city limits or boundaries.

Under the second branch of the defense the defendant's counsel re-opens the discussion of questions that have given rise to great diversity of opinion, and it must be confessed have also presented to the legislator problems of intricacy and difficulty that he has never yet lucidly and satisfactorily solved. He has had to deal with a species of Gordian knot, for the untying of which we may probably suspect he was compelled to the use of the sword. The condition of humanity, it has been found, is such that while it renders the formation of society, and the living in communities under laws a source of inestimable benefit, yet from this same source from which blessings and advantages flow, come also along with them evils and vexations of the gravest character. The case before us presents an example. The defendant's property is essentially a rural estate. It is situated several miles distant from the outskirts of the city; part of his lands are of the original forest, uncultivated and yielding no revenue. Cities may properly be extended in their boundaries as need or convenience may require. The extension of their boundaries may, as in the present case, include rural districts, the condition of which are entirely different from the character of city property. Taxation must be equal and uniform. The ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least one that is never clearly and satisfactorily removed. The rural estates brought within the corporate limits of the city, it is argued, are endowed with advantages they did not possess before, and as an equivalent for the city advantages conferred, they should bear their proportion of the expenses that secure those advantages. But the equivalent in such a case is conjectural and never is settled upon by a concurrence of opinion even among those best qualified to determine the question.

But the principle is well settled and the doctrine established, that a legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike. In *Cooley's Constitutional Limi-*

tations, p. 504, second edition, it is written that "Whenever the corporate boundaries are established, it is to be understood that whatever property is included within those limits has thus been included by the Legislature because it justly belongs there, as being within the circuit which is benefited by the local government, and which ought, consequently, to contribute to its burdens. The Legislature can not, therefore, after having already, by including the property within the corporation, declared its opinion that such property should contribute to the local government, immediately turn about and establish a basis of taxation which assumes that it is not in fact urban property at all, but is agricultural lands and should be assessed accordingly."

The tax in dispute in this case has been imposed since the city charter of 1870, which makes it the duty of the City Council "to lay an equal and uniform tax upon all real and personal property in said city." From these well settled principles, and the law applicable to the case, we conclude that the objections urged against the constitutionality and legality of the tax in question are untenable.

It is therefore ordered that the judgment appealed from be annulled and reversed.

It is further ordered that the plaintiff recover from the defendant the sum of four hundred and five dollars, the amount of tax sued for, with ten per cent. interest thereon from the thirty-first day of July, 1873, until paid, with all costs of suit.

No. 5514.

WM. G. WILMOT et als. v. THE CITY OF NEW ORLEANS et al.

In this instance a writ of injunction was issued by the Superior District Court, at the suit of plaintiffs, restraining the city of New Orleans from enforcing any claim against them for pretended levee dues, wharfage or port charges, and prohibiting W. L. Evans, a justice of the peace, from further proceeding in certain specified cases pending before his court.

An exception was correctly taken to the jurisdiction of the Superior District Court. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Fellows & Mills*, for plaintiffs and appellees. *Sam. P. Blanc*, assistant city attorney, for defendants and appellants.

TALIAFERRO, J. The plaintiffs, who are extensive dealers in coal, complain that they have been harassed by vexatious and illegal suits instituted against them by the city before a justice of the peace, for the purpose of compelling them to pay illegal exactions called "levee dues," which it is pretended the plaintiffs are bound to pay for landing

Wilmot et als. v. The City of New Orleans et al.

and mooring their coal boats along the shore of the river above the limits of the city of Jefferson, where there are no wharves or facilities of any kind provided by the city of New Orleans for the landing or unloading of vessels or boats of any kind. The plaintiffs applied to the Superior District Court for a writ of injunction, restraining the city from enforcing any claim against them for pretended levee dues, wharfage or port charges, and that William L. Evans, second justice of the peace, be prohibited from further proceeding in certain specified cases on the docket of his court, and pending therein against the plaintiffs to enforce said claims. The writs of prohibition and injunction prayed for were granted. Citations were issued to the proper officers of the city; and the city, by its attorney, filed an exception and answer. The exception is that the petition discloses no cause of action, and that the court is without jurisdiction to issue the injunction. The answer avers the right to collect the dues sued for, and prays judgment dissolving the injunction with damages. There was judgment in favor of the plaintiffs as prayed for, and the defendants have appealed.

We think the exception well taken. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them. 4 An. 11; 11 An. 696; 14 An. 505.

It is therefore ordered that the judgment appealed from be annulled and reversed.

It is further ordered that the injunction sued out in this case be dissolved and the case dismissed at plaintiffs' costs.

Rehearing refused.

No. 3609.

SPALDING v. CITY OF JEFFERSON, AND PURDON v. THE CITY OF NEW ORLEANS et als.—Consolidated.

The city is not responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

APPEAL from the Eighth District Court, parish of Orleans. *Hawkins*, judge *ad hoc* in the case of *Spalding v. City of Jefferson*. *F. N. Butler* and *W. H. Rogers*, for plaintiff and appellant. *Rufus Wales*, assistant city attorney for the city of Jefferson, defendant and appellee. *Dibble, J.*, in the case of *Purdon v. the city of New Orleans*. *Rogers* and *Blanc*, for plaintiff and appellant. *H. H. Walsh*, assistant city attorney, for the city of New Orleans, defendant and appellee. *Fellows & Mills*, for the other defendants than the city.

Spalding v. City of Jefferson and Purdon v. The City of New Orleans.

MORGAN, J. Plaintiffs were members of the Metropolitan Police force. In the discharge of their duty they were sent into the then city of Jefferson.

They allege that they were fired upon by an armed body of men, who, they aver, were authorized so to do by the authorities of the city of Jefferson, and were grievously wounded.

They aver that the authorities of the city of Jefferson having countenanced this attack upon them, the city is responsible for the damages which were inflicted upon them.

That they were wounded, and that their sufferings were great, is well established. But we do not think the city responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

Judgment affirmed.

Rehearing refused.

No. 5349.

PAYNE, DAMERON & Co. v. EATON & BARSTOW—E. J. GAY & Co.,
Third Opponents.

The third opponents in this case attempt to regulate the effect of a seizure by a creditor with special mortgage and vendor's privilege, in what relates to them or their junior mortgage, eighteen months after the seizure had been released, the sale consummated, and the funds distributed. This is an extraordinary proceeding. There is no longer any ground for a third opposition to stand upon. The exception that there is no cause of action is well taken.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Breauz, Fenner & Hall*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendants. *A. & W. Voorhies* for third opponents and appellants.

WYLY, J. The plaintiffs, the holders of a note of the defendants for \$10,000, secured by special mortgage and vendor's privilege on a plantation in the parish of St. Landry, foreclosed the mortgage *via ordinaria*, and on the seventh of September, 1872, the sheriff of St. Landry parish sold thereunder said plantation to Elbert Gantt (from whom the defendants had bought it) for \$20,735, of which \$865 48 was applied to payment of taxes and costs, and the balance was distributed as follows: \$1912 63 was applied in part satisfaction of a writ issuing from the district court, parish of St. Landry, under a judgment on a note of concurrent rank and secured by the same mortgage; \$8897 68 was applied in part satisfaction of the writ under which the sale was made; and the balance, \$9056 20, was retained by the purchaser to be applied in part satisfaction to an outstanding note secured in the same

mortgage for ten thousand dollars, due and payable on the first of January, 1873.

Eighteen months after the sale and distribution of the funds, as aforesaid, Edward J. Gay & Co. filed in this suit a paper which they term a third opposition, wherein alleging that they hold a mortgage, second in rank to the one under which the sale was made, for \$4371 78, and alleging that the outstanding note of ten thousand dollars (for the part payment of which the \$9056 20 had been retained by the purchaser) is not valid because the plea of failure of consideration lies against it; they pray that Payne, Dameron & Co., and Elbert Gantt be cited to show cause why they (Edward J. Gay & Co.) should not be paid the amount of their second mortgage, to wit: \$4371 78 out of said \$9056 20 retained by the purchaser, Elbert Gantt, to pay said note of \$10,000.

In bar of this third opposition the defendants therein, Payne, Dameron & Co. and Elbert Gantt, pleaded the following exceptions:

First—The prayer of the petition of opposition is not in accordance with the requirements of article 171 C. P., because it does not pray that these defendants “may be ordered to do or to give a certain thing.”

Second—Because the petition sets forth no cause of action on which a third opposition will lie.

Third—Because the court is without jurisdiction of Gantt, who resides in the parish of St. Landry. The court dismissed the opposition, and Edward J. Gay & Co., plaintiffs therein, have appealed.

We think the court did not err in its conclusion.

A third opposition “is a demand brought by a third person not originally a party to the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him.” C. P. 395. “Such opposition may take place in two cases:

First—“When the third person making the opposition pretends to be the owner of the thing which has been seized.

Second—“When he contends that he has a privilege on the proceeds of the thing seized and sold.” C. P. 396.

“This opposition must be made before the court which granted the order of seizure or the judgment in virtue of which the provisional seizure has been effected.” C. P. 397.

How the plaintiffs in this extraordinary proceeding expect “to regulate the effect of a seizure in what relates to them” or their junior mortgage, eighteen months after the seizure has been released, the sale consummated, and the funds distributed, we can not imagine.

Until the sale was ended and the money distributed, of course

Payne, Dameron & Co. Eaton & Barstow.

Edward J. Gay & Co., junior mortgage creditors, could by third opposition have regulated the effect of the seizure under the first mortgage in what relates to them. They could have caused a *concursum*; and contradictorily with the sheriff, the plaintiffs, the defendants, the purchaser, and the holder of the outstanding note for \$10,000, due first January, 1873, secured by a prior mortgage, but alleged to be invalid for failure of consideration, they could have demanded the payment of their second mortgage claim of \$4371 78, and the rights of all parties could have been fixed and the funds distributed accordingly. But eighteen months after the sale and the distribution of the funds, the remedy of the plaintiffs in opposition, Edward J. Gay & Co., was an hypothecary action. And if the outstanding note of \$10,000 secured by a prior mortgage, due first January, 1873, be invalid, of course the \$9056 20 retained by the purchaser to pay it must be applied in discharge of mortgages next in rank. The exception that the petition sets forth no cause of action on which a third opposition will lie, was well taken; and the judge did not err in dismissing the opposition, although the reason he gave therefor was not a good one.

The case having been tried and submitted below on all the exceptions, can be revised on all of them in this court, although the judge dismissed the suit on one of them and said nothing in regard to the others.

Judgment affirmed.

Rehearing refused.

Mr. Justice Morgan took no part in this case.

No. 3892.

THE PONTCHARTRAIN RAILROAD COMPANY v. THE CITY OF NEW ORLEANS.

In this case the act of the officers of the city and the men in their employ being a trespass upon plaintiff's property, for this the law holds the corporation liable. A judgment in favor of the city of New Orleans, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decrees.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Lea, Finney & Miller*, for plaintiff and appellee. *B. F. Jonas*, city attorney, *S. P. Blanc*, assistant city attorney, for defendant and appellant.

MORGAN, J. Plaintiffs purchased from Bernard Marigny a strip of land fifty feet wide. The purchase was made on the twenty-third February, 1830. The title of Bernard Marigny to the land in question can not be denied. The land was bounded on either side by a public street.

On the fifth March, 1830, the City Council authorized the plaintiffs, during the whole period of the existence of their charter, to cause their road to run in the street, road, or walking avenue, the whole to be established under the direction of the surveyor, and the mayor was authorized to allow them the use of the street, in so far as no inconvenience should result therefrom to the public. The quantity of the public road to be used by them was not to exceed twelve feet.

Acting under this authority the plaintiffs erected a depot which covered their own land; the outside pillars thereof, side walls, side columns, and other portions of the depot rested upon the two strips of twelve feet each on either side of their property. A portion of their track was also laid by them. The buildings were erected within a reasonable time after the passage of the ordinance, and from that time until the year 1870 they were in the peaceful and unrestrained possession and enjoyment of the same.

In July, 1870, the Common Council passed an ordinance by which they revoked the permission which had been given to plaintiffs to use these strips. The mayor shortly thereafter wrote to plaintiffs directing them to remove the obstructions from these strips. They applied for an injunction to protect their tracks as well as their depot. A rule was taken to set aside the injunction under article 307 of the Code of Practice, reserving to plaintiffs the right to recover from the city such damages as might be sustained by such dissolution if a definitive judgment should be rendered in their favor. The rule was made absolute; the motion to bond without furnishing security was granted, and the injunction dissolved in so far as to restrict the defendants in their legislative power to control and regulate the two strips of land of twelve feet in width which was in question, and in so far as it restrained the defendants from removing or causing to be removed the obstructions upon these strips; the tracks, however, were not to be interfered with. This on the third September. It seems that a suspensive appeal from this judgment was applied for and denied. Application was then made to this court for a mandamus compelling the district judge to grant the appeal, and the preliminary order issued. What became of it, however, does not appear.

The then mayor of the city declares that he had told an officer to be ready if the injunction was dissolved to remove the building at once; that he was informed of the decision of the district judge dissolving the injunction, and that, as he believes, within an hour or two afterward, he gave a written order to the officer in which he directs him "to have removed the obstructions from two strips of land twelve feet in width on Elysian Fields street, bordering the space formerly reserved by Bernard Marigny as a canal and covered by an old depot of the

Pontchartrain Railroad Company." He was also instructed not to disturb the railroad track, or any part of the depot, except so far as might be necessary to clear the strips of land aforesaid.

The officer, with a large force, proceeded at once to the execution of this order. On the same day, the president of the company addressed a letter to the mayor in which he notified him that men were then tearing down their depot; that the judgment of the district court decided only that the obstructions upon the two strips be removed, but that the body of men to whom he referred were going far beyond the judgment of the court, and were inflicting damages of a serious nature upon the private property of the company, and while he asserted that he did not acquiesce in the judgment which was being executed, he asked him to arrest the wholesale destruction of the company's property.

On this protest and request no action was taken, no answer was made. The entire edifice was destroyed. The work of destruction commenced in the afternoon of Saturday, the third of September. It continued during that night, during all of the following Sabbath, and through the whole of that night. On Monday morning the building had ceased to exist. The materials were all carried away and lost to the plaintiffs.

The object of this suit is to recover from the city the value of the property thus destroyed and the damages consequent thereupon. There was judgment in favor of the plaintiffs for \$34,428. Defendant has appealed.

The conduct of the mayor was in our opinion reckless and illegal; the damage which it caused was large and unnecessary. He had no right, under any circumstances, to take the law into his own hands. Admit that the judgment of the district court was in favor of the city. That judgment, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decrees. And if it was, the injunction which the plaintiff obtained was not set aside in so far as it restrained the defendant from removing or causing to be removed the obstructions which were upon the property of the city. There was no authorization to tear down the whole building and leave the wreck thereof to be plundered by any one who chose to help himself.

The damage was caused by the city and its officers. It is, therefore, responsible.

The building was necessary to the plaintiffs. It was used as a depot. There goods were received and shipped. It was an adjunct, and a

valuable one, to another depot which they owned in the upper portion of the city.

Some of the witnesses of the defendant say that it was not used as a depot; some that it was a nuisance; that it was used for filthy purposes; that it obstructed the view from the neighboring houses, and interfered with the river and the free circulation of air, and deteriorated the value of property in its vicinity. One of them attributes his having been robbed to the proximity of that building to his residence. But the same witnesses show that everything in that locality is more or less dilapidated; that the buildings are mostly out of repair; that it is infested with dance houses frequented by lewd and abandoned women. It seems to us that the police authorities of the city are more to blame for this state of facts than the freight depot of a railroad company.

On the other hand, the officers of the company show that the depot was much used. The testimony of the witnesses who knew the building best, says that the building though old was good; that it was built of the best brick, cypress, cedar, iron, and covered with the best slate.

Pilié, who is certainly authority upon such subjects, says that "it was perfectly practicable in September, 1870, for the city to have removed the portion of the depot which encroached upon the two strips of twelve feet;" and he describes, satisfactorily, we think, how this could be done, at a cost of not more than \$6000, and in about three weeks time. Swanson says the same thing, fixing the cost at \$3000. So does Evans; so does Besnard.

The act of the officers of the city and of the men in their employ was a trespass upon plaintiffs' property. For this the law holds the corporation liable. *Rabassa v. Orleans Navigation Company*, 5 La. 461; *Mabrie v. Canal Bank*, 11 La. 83; *McGary v. City of Lafayette*, 6 An. 460.

The only remaining question is the amount of damages which should be awarded. These damages consist of the value of the property destroyed and the expense and loss which its destruction caused. Upon this point we think the judgment of the district court should be amended so as to reduce the amount allowed by it to thirty thousand dollars.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be amended so as to reduce the sum allowed by it to thirty thousand dollars, and that thus amended the judgment be affirmed. Appellants to pay costs in the court below; those of the appeal to be paid by appellees.

Rehearing refused.

No. 4684.

EDWARD J. GAY & CO. v. EATON & BARSTOW.

One must be sued before the judge having jurisdiction of the place of one's domicile, except in the cases provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases.

A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding the parties, and consent can not give jurisdiction.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Merrick, Race & Foster*, for plaintiffs and appellants. *Breaux, Fenner & Hall*, for defendants and appellees.

WYLY, J. The plaintiffs sued the defendants, a firm, which they allege is domiciled in the parish of Rapides, for \$4771 78 for advances and supplies furnished defendants' plantation, and they sequestered ten hogsheads of sugar and sixty-nine barrels of molasses, raised on said plantation, upon which they claim the furnisher of supplies' lien. Behan et al. and Gantt intervened, asserting a preference to said produce.

The court dismissed the suit *ex proprio motu* for want of jurisdiction, it appearing from the allegations of plaintiffs that the domicile of defendants' firm was not in the parish of Orleans.

From this judgment plaintiffs appealed. There is no error in the judgment.

Under article 162 C. P. one must be sued before the judge having jurisdiction of the place of his domicile, except in the cases expressly provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases. A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A privilege springs from the nature of the debt. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding on the parties. And consent can not give jurisdiction.

The case of *Rochereau & Co. agents, v. Marcel Guidry*, 24 An. 309, is directly in point and controls this case. There are other decisions of this court to the same effect.

Judgment affirmed.

Rehearing refused.

Mr. Justice Morgan took no part in this decision.

State of Louisiana ex rel. Lynne v. Calhoun, Administrator of Public Accounts, et al.

No. 5515.

STATE OF LOUISIANA ex rel. THOMAS LYNNE v. JOHN CALHOUN,
Administrator of Public Accounts et al.

The plaintiff has failed to prove his allegations that there was, at the time of making his demand, money in the city treasury specially designated and set apart for the payment of judgments. Failing in this, he was clearly without right to the proceeding by mandamus, even if he could otherwise have resorted to it.

A PPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. J. W. Thomas and Alfred Shaw, for relator and appellee. *Samuel P. Blanc*, assistant city attorney, for the defendants and appellants.

TALIAFERRO, J. The relator avers that in pursuance of law he caused to be registered at the department of public accounts of the city of New Orleans, a judgment he had previously obtained against the city, amounting to \$9742; that the same remains unpaid, after the lapse of eight months, although he has repeatedly applied to the proper officer for a warrant for its payment, which is steadily refused. He further alleges that since the registration of his judgment, as well as at the time it was registered, there has been repeatedly in the city treasury, and now is in it, a sufficient sum of money to pay the relator's judgment, specially designated and set apart for that purpose in the annual budget, as well as additional provision therefor under the head of contingent expenses.

The relator, on these grounds, applied to the court *a qua* for a writ of mandamus, commanding the defendant, Calhoun, as Administrator of Accounts, to warrant on the Administrator of Finance for the payment of the relator's judgment; he prays further a writ of injunction against the said Administrator of Accounts, restraining him from warranting on the general funds of the city for any purpose other than that for the payment of the said judgment, until the same be paid.

A rule *nisi* was granted, and the defendant responded, showing for cause:

First—That by act No. 5 of 1870, the court is without jurisdiction to hear, order or allow any writ of mandamus tending, either directly or indirectly, to compel the respondent to issue a warrant for the payment of any claim or judgment against the city of New Orleans.

Second—If the foregoing exception to the jurisdiction of the court be not entertained, the respondent for further cause denies that since the registry of the relator's judgment large sums of money have been received by the Administrator of Finance, out of which the aforesaid judgment was entitled to be paid. He avers that there is no money in the treasury to pay said judgment, and that there has not been any for that purpose.

State of Louisiana ex rel. Lynne v. Calhoun, Administrator of Public Accounts, et al.

The rule was made absolute, and an order rendered that a peremptory writ of mandamus issue.

From this judgment the respondent has appealed.

The plaintiff has failed to prove his allegations that there was, at the time of making his demand, money in the city treasury specially designated and set apart for the payment of judgments. Failing in this, he was clearly without right to the proceeding by mandamus, even if he could otherwise have legally resorted to it.

We think the judgment of the lower court erroneous.

It is therefore ordered that the rule be discharged at plaintiff's cost.

No. 5334.

CITY OF NEW ORLEANS *v.* I. W. PATTON, Sheriff.

This is a suit against the defendant, a former sheriff of the parish of Orleans, to recover from him an aggregate amount of costs and sheriff's fees alleged to have been paid him above what he was entitled by law to collect from the city in criminal cases.

Under the provisions of the statute of 1857 the City Council could not go, in this matter, behind the certificates of judge and clerk. No material change has been made, on this point, under the provisions of section 1042, page 471, of the Digest of 1870. In the former case the treasurer was required to pay the sheriff's bills *upon* the certificate of the clerk and the presiding judge; in the latter case he is required to pay them *after* an account thereof shall be duly certified to be correct by the clerk of the court and the judge.

Taking the context of the two sections above mentioned, their purport is clearly the same, although the phraseology is different. But it is impossible to conclude from such a distinction, as contended for, that the city may, under the existing legislation, inquire into the legality of the sheriff's costs and fees when certified to as above stated.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George S. Lacey*, city attorney, *Sam. P. Blanc*, assistant city attorney, for plaintiff and appellant. *Hays & New*, for defendant and appellee.

TALIAFERRO, J. The city brings this suit against the defendant, a former sheriff of the parish of Orleans, to recover from him \$12,920, alleged to be an aggregate amount of costs and sheriff's fees paid him over and above the amount of costs and fees he was entitled by law to collect from the city in criminal cases. The answer is a general denial. There was judgment for defendant, and the plaintiff has appealed.

The defendant places his defense on the ground that, as he presented his bills to the proper city authorities month by month, they were duly certified according to law by the judge and clerk of the proper court to be correct, and that the city can not go behind the bills thus authenticated and contest any of the items therein contained. It is admitted by the plaintiff's counsel that under the provisions of the statutes of 1857 the city could not go behind the certificates of judge

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and clerk as decided by the court in the case of *Parker v. Robertson*, 14 An. 246, and that of *Shaw v. Howell*, 18 An. 195; but he seeks to show that under the provisions of section 1042, page 471, of the Digest of 1870 a material change was made as to the manner of payment of expenses in criminal cases, and that the city may under the existing legislation inquire into the legality of the sheriff's costs and fees charged in his bills, notwithstanding the judge's and clerk's certificates. He arrives at this conclusion by a process of verbal criticism on the word *upon* used in the statute of 1857 and the word *after* used in the Revised Statutes of 1870. In the former case the treasurer was required to pay the sheriff's bills *upon* the certificate of the clerk and the presiding judge; in the latter he is required to pay them *after* an account thereof shall be duly certified to be correct by the clerk of the court and the presiding judge thereof.

We are unable to see the distinction contended for. Taking the context of the two sections their purport and meaning are clearly the same, although the phraseology used is different. We conclude that the decree of the lower court is correct.

Judgment affirmed.

No. 3637.

JAMES READY et als. v. CITY OF NEW ORLEANS et al.

That the matter in dispute in this case against each of the plaintiffs is less than \$500, is no ground to dismiss the appeal. The matter in dispute is the sum claimed by defendants under a contract with the city, and the amount in the contract far exceeds \$500. The controversy as to them involves the validity of the contract. As they could appeal from the judgment, had it been against them, the plaintiffs also can appeal.

It is sufficient that the surety has signed the appeal bond—the appellants, parties to the suit, being bound without signing the bond, to abide the result of the litigation.

The appeal bond was filed in time. The delay occasioned by the mandamus proceedings to compel the judge to grant the appeal, can not prejudice the appellants.

It is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the council for that purpose. It is sufficient if it be done by those on the portion sought to be improved.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Ogden & Hill*, for plaintiffs and appellants. *Samuel P. Blanc*, assistant city attorney, for defendants and appellees.

ON MOTION TO DISMISS.

WYLY, J. The plaintiffs, James Ready and twenty other persons, property owners, fronting on a certain shell-road constructed by J. J. O'Hara, under a contract with the city of New Orleans, sue to annul the contract on the grounds stated in the petition. And the defendant O'Hara sets up a reconventional demand against each of the plaintiffs for the amount due by them to him under said contract.

The suit as to all the plaintiffs was dismissed on various exceptions, except as to Schmidt, Miller, Lockhart, Reynolds, Fareday, and Sick-forth, contradictorily with whom judgment was rendered rejecting their demand and sustaining the reconventional demand of J. J. O'Hara against them. From this judgment they have appealed.

Seven only of the plaintiffs who were dismissed on exception have appealed, and in this court they have signed a written consent to discontinue the suit and dismiss the appeal. The six appellants, therefore, contradictorily with whom the case was tried on the merits, are the only contestants on the part of plaintiffs now before the court. As to them the defendants move to dismiss the appeal.

First—Because the matter in dispute against each of them is less than \$500.

Second—Because the appeal bond was not signed by the appellants, but only by the surety.

Third—Because the bond was filed after the time for a suspensive appeal had expired.

1. The matter in dispute is the sum claimed by the defendants under a contract with the city for building a shell-road and the amount involved in that contract far exceeded five hundred dollars. If the court below had held the contract to be invalid, the defendants would doubtless have been clamorous for an appeal, because the controversy as to them involved the validity of a contract in which they have an interest of many thousands of dollars. As they could appeal if the judgment had been against them, the plaintiffs also can appeal.

2. The surety signed the appeal bond. This is sufficient, the appellants, parties to the suit, being bound without signing the bond, to abide the result of the litigation.

3. The appeal bond was filed in time. The delay occasioned by the mandamus proceedings to compel the judge to grant the appeal can not prejudice the appellants.

The motion to dismiss the appeal from the judgment on the merits is denied; and the motion to dismiss the appeal from the judgment on the exception by written consent of the parties is granted, appellants from said judgment paying costs of appeal.

ON THE MERITS.

HOWELL, J. The only question presented by the appellants in this case is whether it is necessary for one-fourth of the front proprietors on the whole length of a street to be improved, or only those on the portion sought to be improved, to petition the council for that pur-

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pose. This was judicially settled in the case of Daniel et al. v. City of New Orleans et al., 26 An. 1, in which it was said: "We think the law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved. There can be no reason for supposing the lawmaker intended that either the assent of the owner, whose front had already been paved, or that of him whose front it was not proposed to pave, should be heard, but only the assent of those in whose front the banqueting was to be made." See also 23 An. 306.

The judgment therefore in favor of defendants was correct.

Judgment affirmed.

No. 3567.

JACOB F. WILD v. ALBERT ERATH.

In this case the notes given by defendant for the price of a certain piece of property were made the debt of the firm composed of plaintiff and defendant by the act of partnership and purchase, but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are the individual debt of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm, nor would the payment of said notes out of the interest of each partner in the partnership have such effect.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. G. Schmidt, Kennard, Howe & Prentiss*, for plaintiff and appellant. *J. D. Augustin, F. B. Earhart, Alfred Shaw*, for defendant and appellee.

HOWELL, J. This is a suit to effect the settlement of the partnership which existed between the parties, and the only question for our decision is whether or not the plaintiff is responsible for three notes made by the defendant to his own order and used as capital in establishing the partnership.

These parties purchased a large brewery from Fasnacht Bros. for \$100,000, one-fourth cash, and the balance in monthly installments, evidenced by notes made by the defendant to his own order and secured by mortgage on the property purchased. Not having the money to make the cash payment, the vendors agreed to take notes of the purchasers, indorsed by their friends, and the plaintiff, Wild, furnished one for \$12,500, indorsed by Hecker, and the defendant, Erath, three, one for \$5000, indorsed by Ramelli, one for same sum, indorsed by Battalosa, and one for \$2500, indorsed by Boehler. About four years

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afterward, the defendant made a written proposition to the plaintiff to dissolve the partnership and transfer to him the property, claims, etc., on condition—

First—That plaintiff would assume all the debts of the partnership.

Second—The partners should release all claims against each other.

Third—Plaintiff, within a fixed time, to discharge defendant from all outstanding notes having the signature of Erath & Co. (the style of their firm), and the mortgage notes given by defendant for the original purchase.

This proposition was accepted, and the plaintiff entered into sole possession of the premises. He subsequently caused a notarial act of settlement to be prepared in conformity to the written proposition and called upon the defendant to sign it, which he refused to do, and hence this suit.

As the three notes in controversy do not bear the signature of the firm, and are not especially mentioned, as are those given by Erath alone for the purchase of the property, we think they are not embraced in the proposition for a settlement. *Inclusio unius est exclusio alterius*. Unless they were specially and expressly included, it would not be presumed that they would be, for they simply represented the cash capital which the defendant should have put in and are his individual debt, not in any manner the debt of the firm, and it was only the debts of the firm that plaintiff was to assume. The notes given by defendant for the price of the property were made the debt of the firm by the act of partnership and purchase; but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are the individual debts of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor; and there is nothing in the record to show such assumed liability. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm. Nor would the payment of the said notes out of the interest of each partner in the partnership have such an effect.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of plaintiff dismissing defendant's claim in reconvention and condemning him to perform and carry into effect the contract of transfer and dissolution of partnership described in plaintiff's petition and marked "B," according to its true intent and spirit, defendant to pay all costs.

Rehearing refused.

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No. 5462.

JOHN T. MICHEL v. ZERILLA MEYER et al.

Where the transcript of the appeal was filed on the seventh of November, 1874, and on the eleventh the defendants, appellees herein, filed an answer praying for an amendment of the judgment, and where on the fourteenth they moved to dismiss the appeal, because the appeal bond was not for a sufficient amount, because the transcript was not filed in time, and because the clerk certifying the record omitted to append his signature:

Held—That the motion came too late.

Besides, having joined in the appeal, the appellants ought not to be heard asking for its dismissal.

The certificate appended to the record should be signed by the clerk. This court, of its own motion, orders it to be done, and denies the motion to dismiss.

In this instance, where the plaintiff enjoined an order of seizure and sale issued on behalf of defendants, the judge *à quo* did not err in dissolving the injunction for the sum really due by plaintiff, and perpetuating it as to the small sum received by defendant and to be credited to plaintiff, but he should have allowed damages on the amount that was due. The remittitur by defendants is an admission that the writ issued for more than was due. The making of a remittitur does not remove the existence of the cause for the injunction, to that extent, at the date of its issuance.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. R. King Cutler*, for plaintiff and appellant. *J. M. Harding*, for defendants and appellees.

ON MOTION TO DISMISS.

WILY, J. The transcript of this appeal was filed on the seventh November, 1874. On the eleventh the defendants, appellees herein, filed an answer praying for an amendment of the judgment. On the fourteenth they moved to dismiss the appeal because the appeal bond was not for a sufficient amount, because the transcript was not filed in time, and because the clerk certifying the record omitted to affix his signature.

The motion comes too late. Besides having joined in the appeal the appellants ought not to be heard asking its dismissal.

The certificate appended to the record, however, should be signed by the clerk. Of our own motion, it is ordered that the clerk of the Fifth District Court, Thomas Duffe, affix his signature to the certificate appended to the record. And the motion of appellees is denied.

ON THE MERITS.

HOWELL, J. The plaintiff enjoined an order of seizure and sale on the grounds:

First—That the creditor had given an extension and was to receive rents of the property during said extension in consideration thereof.

Second—That out of said rents the creditor was to pay the insurance premium, which she failed to do.

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Third—The property is improperly described in the advertisement.

On the trial in the lower court the judge found that the extension, which had been granted, had expired before the writ issued and had not been renewed, but that the defendant had received sixty dollars in rents, for which no credit was given, and he perpetuated the injunction as to such sum and dissolved it as to the balance, without damages. The plaintiff appealed, and in the answer the defendant asks that the judgment be amended by allowing the highest damages and dissolving the injunction *in toto*, because, pending these proceedings, a remittitur was entered in the executory proceedings.

We think the judge *a quo* did not err in dissolving the injunction, for the sum really due and perpetuating it as to the small sum received by the defendant, but he should have allowed damages on the amount that was due. See 4 An. 150; 3 An. 125.

The evidence does not establish the extension as alleged by plaintiff, and the remittitur is an admission that the writ issued for more than was due. The making of a remittitur does not remove the existence of the cause for the injunction, to that extent, at the date of its existence.

It is therefore ordered that the judgment appealed from be amended by condemning the plaintiff and his surety on the injunction bond *in solido* to pay defendant, Z. Meyer, \$600 damages and all costs of suit.

Rehearing refused.

 No. 3580.

MARTIN KENOPSKY v. MARK DAVIS et al.

The privy, in this instance, being built upon the yard or space of ground belonging in common between the parties, the defendant had no right to place or keep said privy on it without the consent of his co-owner.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Whittaker & Rice*, for plaintiff and appellee, *J. J. Barnett* and *F. Fuselier*, for defendants and appellants.

TALIAFERRO, J. The plaintiff complains that against his consent, and greatly to his annoyance and injury, the defendants have built a privy in a yard owned in common by them and plaintiff, which, from the condition it is kept in, has not only become an intolerable nuisance, but works serious damage to the property of the plaintiff. He avers that, in the structure of the privy the defendants have illegally broken into the walls of the plaintiff's building and rested the joists necessary in the construction of the privy, which is elevated to the height of two stories, upon the walls of the plaintiff's building. He further sets forth

that the vault of the privy is constructed contrary to law, if the defendants had a right to place it where it is; that the offensive dampness and noxious effluvia necessarily arising saturate the walls of the plaintiff, injuring them seriously and causing damage to his stock of goods kept in his building, owing to the close proximity of the nuisance complained of. He prays damages to the amount of three thousand dollars, and that an injunction issue to prevent defendants from using or permitting to be used by others the privy so unlawfully established by them to the injury and annoyance of the plaintiff.

The answer is a sweeping denial of all the allegations of the plaintiff. It avers that the vault and privies have been in the uninterrupted possession of the defendant, Davis, by himself and his lessees, for more than ten years, and the plea of prescription of ten years is interposed.

This suit was commenced in the Sixth District Court in the year 1869. A judgment was rendered in that court on the twenty-fifth of May, 1870, in favor of the defendants. An application was made for a new trial; but, pending the motion, the case was transferred to the then newly established Eighth District Court. In the Eighth District Court a new trial was granted, and the case was tried upon the voluminous evidence taken on trial of the case in the Sixth Court, with some additional evidence taken on the second trial. In the inception of the suit in the Sixth Court, the judge thereof granted an injunction, which was dissolved. He gave at considerable length the reasons that determined his decree in favor of the defendants, and it is not unworthy of remark that the judge of the Eighth Court, adopting entirely, as it appears, the reasoning of the judge of the Sixth Court, arrived at a conclusion diametrically opposite from that of the latter. The judgment of the Eighth Court awarded the plaintiff the three thousand dollars damages prayed for and perpetuated the injunction.

From this judgment the defendants have appealed.

We do not concur in opinion with either of our learned brothers of the courts below. The privy being built upon the yard or space of ground belonging in common between them, the defendants had no right to place or keep a privy on it without the consent of his co-owner. We are unable to find from the large mass of evidence, conflicting as it does to no small extent, that the plaintiff has made out a case entitling him to three thousand dollars damages, or even that he is entitled to damages at all to any certain appreciable amount.

It is therefore ordered that the judgment of the lower court, so far as it awards damages in favor of the plaintiff, be annulled and avoided, and that the judgment, as thus altered, be affirmed, the defendants paying costs in the lower court; the plaintiff and appellee paying costs of this appeal.

Rehearing refused.

No. 4037.

HENRY EDEN v. F. LEMANDRE et als.

This is a suit to recover the penalties stipulated in two charter parties, for the violation thereof, in relation to voyages to be made by two different vessels.

The putting in default was sufficient as to one of the vessels, but there is no proof that either of the modes for putting in default pointed out in article 1911, R. C. C. No. 2, was observed in relation to the other vessel, until the day the contract expired, when it was impossible for the vessel to execute her voyage on, or previous to, that day. The defendants are therefore liable jointly and *in solido*, as they bound themselves, only for the infraction of the contract as to one of the vessels.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. F. C. Zacharie*, for plaintiff and appellant. *E. Bermudez* and *Charles F. Olaiborne*, for defendants and appellees.

HOWELL, J. The plaintiff sues to recover the penalties stipulated in two charter parties for the violation thereof. The defense is a general denial. Two vessels were chartered by the plaintiff to the defendants "for voyages from the ports of Ruatan and Utila to New Orleans, until the first day of June, 1871, including any voyage which may have commenced on or previous to that day." The charterers were to furnish the said vessels with cargoes of fruit, or money to purchase the same; the freight was to be paid a part in advance, and the balance on arrival in New Orleans. The penalty in the case of one vessel was fixed at \$750, and of the other at \$700. One of the vessels, the brig Ruatan, was at the date of the contracts (which were made in New Orleans), in the port of Grand Cayman; the other, the schooner Lizzie Lina, in New Orleans. Three voyages were made by each of the vessels, the defendants in New Orleans advancing the funds to purchase the cargoes. On the twentieth May, 1871, the brig was ready to leave New Orleans to make the fourth voyage, and the captain called on J. Macheca & Co., with and through whom he had previously transacted all matters under the charter parties, notifying them in writing of his readiness to proceed to make the voyage, and demanding the funds necessary to procure the cargo. Macheca & Co. answered that their associates would not allow the vessel to go out; they agreed to pay their portion if the owner would not sue, and said they had advanced for the others on the former voyages and had not been reimbursed. The other parties were aware that the brig was ready and awaiting advances. The schooner was ready on the twenty-second May, and the plaintiff (the captain thereof) called on Macheca & Co. in relation to both vessels, and was told that the charterers were losing money and proposed to compromise by keeping one vessel, if released from the other. Nothing was effected between the parties, and on the thirty-first May a formal demand was made of each of the defendants to comply with the charters, to which they answered in writing that they were "ready

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to comply with the charter party." On the next day they were called on for the balance of freight due on the last voyage, and for the money to purchase the next cargo. The freight was paid, but the cargo money was refused on the ground that the charter was abandoned. It is contended by the defendants that they were not legally put in default, and that if they were it was too late, as it was then impossible to begin a voyage from Ruatan to New Orleans.

As to the brig Ruatan, we think the defendants were put in default by the written demand of the captain on twentieth May, and that the evidence shows that she could have gone to Ruatan previous to the first of June. But, as to the schooner Lizzie Lina, there was no default until the thirty-first of May, the day on which the charter was to expire. By article 1911, R. C. C. No. 2, the debtor is put in default either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

There is no proof that either of the modes was observed in regard to the last named vessel, until the day the contract expired, when it was impossible for the vessel to go to Ruatan to commence a voyage on or previous to the first day of June, according to the terms of the contract. The defendants bound themselves jointly and *in solido*.

It is therefore ordered that the judgment appealed from be reversed, and that the plaintiffs recover of the defendants *in solido* the sum of \$750, with legal interest from the first day of June, 1871, and costs.

No. 3948.

MECHANICS' AND TRADERS' BANK v. J. BARNETT.

This is a suit brought against defendant on a note drawn by him, and pledged as security to plaintiff by Carlos, Marks & Co. for the payment of three of their notes. The defense is that the defendant has paid two of the notes, and has tendered the plaintiff the amount of the last one, for which the instrument sued on was given in pledge, it being a note signed for accommodation and without consideration, for the benefit of the pledgors.

The plaintiff knew that the pledge was an accommodation note. In law and equity, therefore, the defendant ought not to be required to pay more than the amount for which the pledge was given, to wit: the three notes discounted by Carlos, Marks & Co., and ought not to be extended to cover money overdrawn by said Carlos, Marks & Co. But a formal real tender of the money having not been made as required by law, defendant can not be exonerated from interest and costs.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Randolph, Singleton & Browne*, for plaintiff and appellant. *E. Howard McCaleb*, for defendant and appellee.

WYLY, J. On the twenty-fourth of March, 1870, Carlos, Marks & Co. had discounted at the Mechanics' and Traders' Bank their three promis-

sproy notes for \$1000 each, maturing, respectively, in thirty, forty-five and sixty days after date; and as security they pledged the accommodation note of J. Barnett for \$3100, drawn to his own order and indorsed in blank, payable sixty days after date.

Carlos, Marks & Co. failed before the maturity of their first note, and it was paid by Barnett, who also paid the second note at maturity.

He applied at the bank to pay the last note, for which his own was held in pledge, at maturity, and its payment was refused, the bank demanding payment of the pledged note in full. The plaintiff, the Mechanics' and Traders' Bank, then brought this suit against Barnett for \$3100, the full amount of his accommodation note, issued to said Carlos, Marks & Co. The defense is the defendant has paid two of the notes and tendered the plaintiff the amount of the other, for which the instrument sued on was given in pledge, it being a note issued for accommodation and without consideration to the pledgors, Carlos, Marks & Co. The court maintained the defense, giving judgment requiring the plaintiff to deliver to the defendant his note on payment of \$1000, costs being paid by the plaintiff.

The plaintiff has appealed.

After the first note of Carlos, Marks & Co. had matured, it is contended, the bank obtained their consent to extend the pledge to cover the sum of \$1126 32, the amount overdrawn by said pledgors, not being aware that the pledged note was accommodation paper.

On the other hand, Carlos, who effected the discount with the bank, swears positively that the president and the cashier were acquainted with the fact that the note of defendant, given in pledge, was executed by him to Carlos, Marks & Co. for accommodation and without consideration. Therefore, if the subsequent conversation between the president of the bank and Carlos, in regard to the overdrawing by the latter, be extended to imply his consent that the pledged note might also be held as collateral security for the amount so overdrawn (on which point the proof is not at all conclusive), it would be of no avail to the plaintiff, because the latter had knowledge that the thing pledged was accommodation paper. We regard the pretended second pledge of the note, or the statement in relation thereto, as a feeble attempt to secure a bad debt of \$1126 32, the amount overdrawn by Carlos, Marks & Co. In law and in equity the defendant ought not to be required to pay more than the amount for which the pledge was given, which was nearly the full amount of the pledged note. He has already paid plaintiff two thousand dollars, and has offered to pay the balance—one thousand dollars—which was refused.

The defendant swears he made a tender to plaintiff at maturity of the last note for which his own was pledged; but it is not proved that

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a formal real tender of the money was made as required by article 407 C. P. The defendant can not, therefore, avail himself of the exoneration from interest and costs stated in article 415 C. P. See, also, 6 La. 19; 4 R. 144; 2 An. 441; 12 An. 246; R. C. 2168, 2169; C. P. 404, 407.

It is therefore ordered that the judgment herein be set aside, and it is decreed that the plaintiff recover of the defendant one thousand dollars, with legal interest from the twenty-fourth of May, 1870, and that the same be paid on plaintiff delivering to the defendant the note in suit, and also the note of Carlos, Marks & Co. for \$1000, payable sixty days from the twenty-fourth of March, 1870. It is further ordered that defendant pay costs of both courts.

No. 5526.

STATE ex rel. ATTORNEY GENERAL et als. v. B. F. JONAS.

It can not be doubted that the intention of the law is, that the city attorney must be elected biennially by the council. It is also clearly stated in the city charter that his term of office is two years.

Under the law the council can only elect a city attorney on the third Monday of November, or as soon thereafter as practicable, and unless the term expires biennially at that time, this duty could not be performed by said council.

The term of office of the mayor and administrators began on the first Monday of November, 1870, and continued for two years. That of the city attorney, the surveyor and the recorders began on the third Monday of November, at which time the law required these offices to be filled by an election for two years.

With a view to give effect, if possible, to every part of the law, it must be concluded that the government established when the city charter went into operation in April, 1870, was a temporary organization, and that the permanent government began after the election of the mayor and administrators on the first Monday of November, 1870.

Under this construction full effect can be given to that provision of the charter making it the duty of the council to elect a city attorney at the first regular meeting after its induction into office. This could not be done if the term of the city attorney began with the temporary organization in April, 1870, and continued for two years. The law clearly contemplated a vacancy and the beginning of a new term at the time required for the election. Otherwise, that election which was imposed as a duty on the city council could not have been performed—which would have been an absurdity. Hence it follows that the election of defendant by the council, as city attorney, on the fifth of December, 1874, was valid.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.* Jury trial. *Henry C. Dibble*, Assistant and Acting Attorney General, and *J. B. Cotton*, for plaintiff and appellant. *Labatt, Aroni, and Olinton*, for defendant and appellee.

WYLY, J. This is a controversy under the intrusion act, for the office of City Attorney of New Orleans. On fifth December, 1874, the defendant, B. F. Jonas, was elected by the City Council, and on the same day H. H. Walsh, who is joined as co-plaintiff, was appointed by the Governor.

The court, on the verdict of a jury, gave judgment for the defendant, and plaintiffs appeal.

The term of office is two years. At the beginning of a term power to fill the office by election is vested in the City Council. Section thirty-one of act No. 7 of acts of 1870. If a vacancy occurs, from any cause, power to fill it is confided to the Governor. Revised Statutes, section 1577.

The important question is: When did the term of office begin?

If in November, 1874, the election of Jonas by the council, on the fifth of December, the first regular session after its own election, conferred title on him.

If, on the other hand, the term began in April, 1874, when George S. Lacey, the late incumbent, was appointed, then his resignation on the fifth of December, 1874, created a vacancy, which was properly filled by the Governor, when he appointed H. H. Walsh.

As there is much confusion in the charter of 1870 in regard to the beginning of the terms of the several offices therein mentioned as continuing for the period of two years, it becomes necessary to examine several sections of said charter, being act No. 7 of acts of 1870. It was approved on sixteenth March, 1870. Section four provides that the government of the city of New Orleans shall be vested in a mayor and seven administrators, naming them; "and said mayor and administrators shall be appointed or elected as hereinafter provided and shall form the council of the city of New Orleans. The Governor shall, by and with the advice and consent of the Senate, appoint the mayor and the seven administrators, who shall hold their offices until the first Monday of November, 1870, or until their successors are elected and qualified." It further provides for an election on that day.

Section six provides: "That on the second Monday following the day of their appointment or election the council shall hold its first meeting in the city hall, at which the mayor and administrators of department elect, having presented and filed their certificates of election and qualification, as herein provided, shall enter upon the discharge of their duties as specified in this act, and their predecessors shall turn over to them all books, papers, property, money, and accounts pertaining to their offices and to the city of New Orleans."

Section eight provides what shall be the duties of the mayor; also that "his term of office, when elected, shall be for two years." * * The charter also fixes the term of office of the administrators at two years.

Section thirty-one provides: "That it shall be the duty of the council at its first regular meeting after its induction into office, or as soon thereafter as practicable, to elect a secretary, whose duties shall

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be, etc. Also a city attorney, learned in the law, who shall be the legal adviser of the corporation, etc. * * * He shall hold his office for a term of two years, unless sooner removed as provided for in this act. * * * Also a city surveyor, whose duty it shall be, etc. * * * He shall hold his office for two years, unless sooner removed as provided in this act. * * * Also six recorders, one for each district, whose duties, etc. * * * Such recorders shall hold their offices for a term of two years, unless sooner removed as herein provided for in this act, etc." * * *

It thus appears that a term of two years has been fixed as the period of duration for the offices of mayor, administrators, city attorney, surveyor, and recorders. The mayor and administrators are to be elected on the first Monday of November biennially. On the second Monday following their election "the council shall hold its first meeting in the city hall, at which the mayor and administrators of department elect, having presented their certificates of election and qualification, as herein provided, shall enter upon the discharge of their duties as specified in this act, and their predecessors shall turn over to them the books, papers," etc.

By express provision of section thirty-one it is made the duty of "the council at its first regular meeting after its induction into office, or as soon thereafter as practicable, to elect a secretary. * * * Also a city attorney, learned in the law, etc. * * * He shall hold his office for a term of two years," etc. * * * That the intention of the law is, the city attorney must be elected biennially by the council, can not be doubted; and that his term of office is two years is clearly stated in the charter.

The theory of plaintiff is that the term began first in April, 1870, when the city government was organized under the charter approved sixteenth March, 1870. Therefore the first term expired in April, 1872, the second in April, 1874, and the third will expire in April, 1876. Consequently, when George S. Lacey, who was appointed on thirteenth April, 1874, resigned, a vacancy was created which, under Revised Statutes, section 1577, the Governor properly filled in appointing Walsh, December 5, 1874. The difficulty about this theory is, the council can only elect a city attorney for the first term, and after that can not exercise the power of election, which the statute doubtless intended it to employ biennially, because in the precise language of section thirty-one, creating the office, it is made the duty of "the council at its first regular meeting after its induction into office, or as soon thereafter as practicable," to elect a city attorney; and under section six the first regular meeting is fixed on the second Monday following the day of the election of the council, to wit: the third

Monday of November. Under the law the council, therefore, can only elect a city attorney on the third Monday of November, or as soon thereafter as practicable; and unless the term expires biennially at that time, how can this duty be performed by the council?

Construing all the sections together with a view to give effect, if possible, to every part of the law, we conclude that the government established when the charter went into operation, in April, 1870, was a temporary organization, and that the permanent organization began after the election of the mayor and administrators on the first Monday of November, 1870; also, that the language fixing the terms of the various offices was used with reference to the permanent organization of the city government.

The term of office of the mayor and administrators began on the first Monday of November, and continued but two years. That of the city attorney, the surveyor, and the recorders began on the third Monday of November, being at the first regular meeting of the council after its induction into office, at which time the law required these offices to be filled by an election for two years. Under this construction full effect can be given to that provision of the charter making it the duty of the council to elect a city attorney at the first regular meeting after its induction into office. This could not be done if the term of office began with the temporary organization in April, 1870, and continued for two years. Where the law makes it the duty of the council to perform an act at a certain regular meeting occurring on the third Monday of November biennially, the presumption is there was contemplated a circumstance which shall render the act necessary, and in this case that circumstance was the contemplated vacancy occurring in the office of city attorney by reason of the expiration of the term thereof. The law clearly contemplated a vacancy and the beginning of a new term at the time it required the council to elect a city attorney for a term of two years.

It would be absurd to say that the law intended the council to perform a duty at a particular time biennially and at the same time meant that that duty could not then be performed. The council could not elect a city attorney at the first regular meeting after its induction into office so that he could hold his office for two years, unless it was the beginning of a term. And as before remarked, it could not elect at all if the theory of plaintiff be correct, that the term of said office expires biennially in April; because there would never be a vacancy the council could fill at the first regular meeting after it was elected and inducted into office.

Judgment affirmed.

 Amelia Simoneaux v. Helluin, Sheriff, et al.

No. 5562.

AMELIA SIMONEAUX, Wife of EMILE E. LAUVE, v. EDGAR P. HELLUIN, Sheriff, et al.

In this case it can not be doubted that the plaintiff had the right to manage her plantation, which was paraphernal property, and that a mandate having for its object the management thereof has a lawful object. Therefore, as there is no law forbidding the plaintiff from appointing her husband an agent to aid her in the administration of her plantation, it must be concluded that she had the right to do so.

The thing seized being raised on the plantation of plaintiff, which she administered, aided by her husband as agent, it follows that it was her separate property, and not liable to seizure by her husband's judgment creditors.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J. LeBlanc and Guion*, for plaintiff and appellee. *E. N. and William Sims*, for defendant and appellant.

WILY, J. Mrs. John A. Sigur sued plaintiff and her husband in July, 1873, for \$1183 60, praying judgment *in solido* against them for said sum. In October, 1873, the suit was discontinued as to plaintiff, and judgment for the amount claimed was rendered against her husband, Emile E. Lauve. Execution issued in December following on this judgment, and twenty hogsheads of sugar, raised on the plantation of plaintiff, were seized by the sheriff. Thereupon the plaintiff sued out an injunction, claiming the sugar as the fruits of her paraphernal property, the plantation, administered by herself. The court maintained the injunction and the defendant, Mrs. Sigur, who was the seizing creditor, has appealed.

It is admitted that the plantation on which the sugar was raised was the paraphernal property of the plaintiff. But two questions are presented for decision :

First—Could the plaintiff, during the existence of community, administer her paraphernal property, the plantation, through her husband as agent, her health being such that it was impossible for her to take personally the management or supervision of the plantation ?

Second—Did the plaintiff during the year 1873, when the sugar in question was raised, administer her plantation, on which she resided, through her husband as agent ?

Both of these propositions from the law and the evidence in this case we feel warranted to answer in the affirmative.

The only limitation the law imposes in the contract of mandate is found in article 2987 of the Revised Code, which provides that: "The object of the mandate must be lawful and the power conferred must be one which the principal himself has the right to exercise."

In the case at bar no one doubts that the plaintiff had the right to manage her plantation, and that a mandate having for its object the management thereof has a lawful object. As there is no law forbidding the plaintiff from appointing her husband an agent to aid her in

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the administration of her plantation, we conclude that she had the right to do so. 2 An. 890; 14 An. 68; 17 La. 426.

After examining the evidence very carefully, we have come to the conclusion that the finding of the court *a qua* is correct in regard to the fact that the thing seized was raised on the plantation of plaintiff, which she administered, aided by her husband as agent. It was therefore her separate property, and not liable to seizure by her husband's judgment creditor, Mrs. Sigur.

Judgment affirmed.

No. 5541.

STATE ex rel. MRS. PECOT et al. v. PARISH JUDGE OF THE PARISH OF ST. MARY.

The respondent refuses to grant to relators a suspensive appeal on the ground that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor or against them from which they could appeal. In this there was error on the part of the judge *a quo*. If the relators were not parties to the suit, it was because the judge erroneously refused to allow them to intervene. But third parties may intervene when they allege, as they do in this case, that they have been aggrieved by the judgment.

APPPLICATION for a mandamus to be directed to the parish judge of the parish of St. Mary, *E. B. Mentz. D. Caffrey*, for relators. *E. B. Mentz, in propria persona*.

TALIAFERRO, J. The relators complain that they were refused a suspensive appeal in a certain case pending in the parish court of the parish of St. Mary, by the parish judge of that parish. A rule *nisi* was granted and the respondent answers: That he refused to grant the appeal on the ground that the relators were not parties to the suit; that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor, or against them, from which they could appeal. They had no right to appeal from a judgment against the defendant, their intervention not having been passed on.

We think there was error on the part of the judge. The relators, it appears, were not parties to the suit because the judge erroneously, as we think, refused to allow them to intervene. But third parties may intervene when they allege they have been aggrieved by the judgment. C. P. article 571. The relators aver that they have been aggrieved by the judgment.

It is ordered that the rule be made absolute, and that the parish judge of the parish of St. Mary do grant the relators a suspensive appeal as prayed for, upon their furnishing bond and security according to law. It is ordered, further, that the respondent pay costs of these proceedings.

Payne & Harrison v. Mrs. Stackhouse.

No. 3690.

PAYNE & HARRISON v. MRS. H. A. STACKHOUSE.

The difficulty in this case arises from the loss of a counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. The bills of exceptions as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

An unreasonable contract is not to be supposed probable. It is not to be presumed that plaintiffs, who were merchants and business men, would have consented to advance large sums of money to cultivate a plantation for defendant's benefit, and themselves incur all the risks and losses attending the enterprise if not successful.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Breaux, Fenner & Hall*, for plaintiffs and appellees. *C. Roselius and Alfred Phillips*, for defendant and appellant.

WYLY, J. The defendant appeals from a judgment against her for \$39,652 20, on an account of the plaintiffs against the Barataria plantation, alleged to belong to her.

The facts are, that this plantation belonged to J. W. Ross, the first husband of defendant; that from his succession the plaintiffs, who were creditors for \$15,617 72, were induced to buy said property in the name of J. U. Payne, one of the copartners, at the request and for account of defendant, then the surviving widow; that the title was so taken merely for the purpose of securing the claim of plaintiffs, with the understanding that they were to cause the title to be transferred to defendant, then Widow Ross, as soon as their claim and all the subsequent advances they agreed to make to carry on said "Barataria plantation" were paid to them. The planting operations seem not to have been successful; instead of paying out, the debt largely increased, so that when the plaintiffs subsequently, at the request of defendant, caused the title to be transferred to Wm. Stackhouse, now her husband, a large debt remained on the books of plaintiffs against the Barataria plantation, embracing not only advances for the administration and cultivation of said plantation, but large sums furnished to pay the personal expenses of defendant and her family, such as medical bills, traveling expenses, tuition and board bills of her children, and also the cost of a tomb for Mr. Ross, her deceased husband.

The court was not satisfied that the evidence was sufficient to establish the liability of defendant based on her alleged assumption to pay the debt of her deceased husband, and, striking from the account the amount thereof, to wit: \$15,617 72, rendered judgment against the defendant for the balance due for advances made subsequent to the

purchase of said "Barataria plantation," to wit: \$39,652 20. As appellees have not prayed an amendment of the judgment, the ruling of the court in this regard can not be revised.

The difficulty in the case arises from the loss of the counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. And here we will remark that the bills of exception as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

Both parties admit that there was a writing between plaintiffs and defendant, wherein it was stated that the purchase of said plantation was for defendant's benefit; also that said plantation was to be cultivated, and when plaintiffs were paid the amount of their existing claim, and also the amounts subsequently advanced by them, the title was to be conveyed to defendant. But the defendant contends that she was not to be responsible for any of the losses arising in the administration of the plantation; that if the crops were sufficient to pay out, she was to have the benefit; if they failed, she was to incur no personal responsibility.

After examining the evidence carefully we have come to the conclusion that this theory or version placed on the contract by the defendant can not be accepted by the court as the correct one. We think that the evidence of J. U. Payne, in regard to the nature of the contract, is more reasonable, and that plaintiffs' theory is the correct one. The testimony of this witness, taken with the other proof in the record, satisfies us, as it did the judge *a quo*, that the real purchaser from the succession of J. W. Ross was the defendant; that J. U. Payne was merely a party interposed, and that the effort to make the plantation pay out the debt existing against it on the books of the plaintiffs was in behalf of the defendant; that as she was to get the benefit, if the administration of the plantation was successful, she must be responsible for the losses, if unsuccessful. It would be unreasonable to suppose that plaintiffs, who were merchants and presumably business men, would have consented to advance large sums of money to cultivate the "Barataria plantation" for defendant's benefit, and themselves incur all the risks and losses attending the enterprise.

Judgment affirmed.

Sam Smith & Co. v. City of New Orleans.

No. 3925.

SAM SMITH & CO. v. CITY OF NEW ORLEANS.

There is no law that authorizes plaintiffs to claim interest on the bills issued by the city as currency; nor is there any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded.

The assent of the Mayor that the plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city.

The rights of the plaintiffs were fixed by a statute. They were authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and can claim no more.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. L. E. Simonds and Alexander Walker*, for plaintiffs and appellees. *Samuel P. Blanc*, assistant city attorney, for defendant and appellant.

TALIAFERRO, J. The plaintiffs sue for legal interest on a large amount of what was known as "city money," held formerly by them, and which they exchanged for bonds of the city, bearing seven per cent. interest under the provisions of an act of the Legislature, approved February 27, 1869, entitled "An act to enable the City of New Orleans to fund its floating debt and to liquidate its indebtedness." They aver that they funded the said obligations of the city under the express understanding that in doing so they reserved their right to claim interest on the notes or obligations so held by them, and to have their claim submitted for judicial determination—that this was assented to by the Mayor and the Administrator of Finance. They claim five per cent. interest on the amount of the obligations of the city held by them, from the first of January, 1869, to the second of July, 1870, the time at which they were funded. They further sue for interest at five per cent. per annum on \$52,614 93, amount of warrants of the Controller drawn upon the City Treasurer. The interest claimed on the amount of warrants in like manner funded is for the same period as in the former case—the same reservation being made of the right to claim interest.

The answer is a general denial.

There is in the record a bill of exceptions, taken to the ruling of the court admitting the plaintiffs to file a supplemental petition. The conclusions we have arrived at on the merits of this case render it unnecessary to pass upon the bill of exceptions.

The case was twice tried in the court below, and each time the judgment rendered was in favor of the plaintiffs. The defendant has appealed. We think the judgment erroneous. We are unable to find any warrant of law that authorizes the plaintiffs to claim interest on the bills issued by the city as currency, and we are equally at a loss to

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find any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded. The statute authorizing the city to fund its debt is entirely silent as to interest in either case. The assent of the Mayor that plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city, and conferred no right upon the plaintiffs to recover interest. The rights of the plaintiffs seem fixed by the statute. They are authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and they are precluded from urging any further demands.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiffs paying costs in both courts Rehearing refused.

No. 3952.

MR. AND MRS. LEFRANC *v.* CITY OF NEW ORLEANS.

It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school, or charitable purposes, by implication prohibits the General Assembly from exempting property not actually used for such purposes.

The exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State. It means a complete, and not a partial exemption, and this limitation must apply to the power of taxation previously delegated to the municipal corporations of the State.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. G. Schmidt*, for plaintiffs and appellants. *S. P. Blanc*, assistant city attorney, for defendant and appellee.

WYLY, J. In this controversy the important question is whether plaintiffs' property situated on Bourbon street, actually used as a school house for the purpose of educating female children, is liable to the taxes of the city of New Orleans for the year 1869.

Under the charter of the city existing prior to the constitution of 1868, and in force when the taxes in question were levied, property actually used for a school was not exempt from taxation, unless it exclusively belonged to an incorporated or a religious society. Therefore the defendant contends that the property of plaintiffs is not exempt from the taxes of 1869.

On the other hand, it is urged that subsequent to the charter of the city denying exemption from taxes to plaintiffs' school house, the constitution of 1868 was adopted, which provides, article 118, that "taxation shall be equal and uniform throughout the State. All property

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shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes." * * *

And to carry into effect this constitutional provision, the General Assembly on twenty-first October, 1868, prior to the assessment of the taxes in question, passed an act exempting "colleges, school houses and other buildings for the purpose of education, and their furniture, apparatus and all equipments, and the lots thereto appurtenant and used therewith, so long as the same shall be actually used for that purpose." It is urged that this law, in force at the time the taxes complained of were levied, exempted plaintiffs' school house from taxation by the city. It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school or charitable purposes, by implication prohibits the General Assembly from exempting property not actually used for such purposes. *Morrison v. Larkin*, tax collector, 26 An.

Assuming that the statute of 1868, exempting all the property from taxation that the constitution authorizes, had as much effect as if the exemption had been mentioned in the constitution itself, the question is, did this exemption relieve the property of plaintiffs from subsequent municipal taxation under the city charter previously granted, which contained no such exemption?

We think an exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State; that when the people, speaking through the constitutional convention and through the Legislature, declare that all property actually used for church, school or charitable purposes, shall be exempt from taxation, they mean a complete, not a partial, exemption from the burden of taxation; also, that this limitation shall apply to the power of taxation previously delegated to the municipal corporations of the State. Therefore we conclude that the school house of the plaintiffs was not liable to the taxes of 1869, assessed by the city of New Orleans.

It is therefore ordered that the judgment herein in favor of defendant be annulled, and it is decreed that there be judgment for plaintiffs perpetually injoining the defendant from collecting the taxes assessed against their property for the year 1869, also annulling the judgment obtained by the defendant for the amount of said taxes. It is further ordered that the defendant pay costs of both courts:

Rehearing refused.

Ledoux v. Breaux, Sheriff, et als.

No. 5670.

LOVEL LEDOUX, Administrator, v. J. E. BREAU, Sheriff, et als.

After the decease of his wife, the plaintiff, administrator of community property, gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux obtained judgment, issued execution, and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale. The record shows that the estate has not been settled up; there are debts outstanding against it besides the one for which the administrator gave his note. Under such circumstances, the seizing creditor could expect only to be paid concurrently with other creditors of the estate in the due course of administration. His proceedings are illegal and irregular.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J. John Yoist and C. E. Schmidt*, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

TALIAFERRO, J. The plaintiff administers the succession of his deceased wife. The property administered is community property. After the decease of the wife the plaintiff gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux sued upon this obligation and obtained judgment, with recognition of right of mortgage, and thereupon issued execution and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale of the property seized on the ground that the debtor in execution has no right in the property seized, except what may remain to him after the settlement of the community affairs; that the property of the succession can not be subjected to the separate debts of the survivor in community.

The defendants answer that their debt is a community debt, and the whole community property is bound for its payment, and that neither the administrator, heirs nor legal representatives have any interest therein until all the community debts are paid. There was judgment in favor of the administrator, perpetuating the injunction, and the defendants have appealed.

The proceeding seems to be irregular. It appears that the succession has not been settled up; that there has been no final account; that there are debts outstanding against it besides the one for which the administrator gave his note and executed the mortgage which the defendants are seeking to enforce. It appears that after executing the note and securing its payment by the mortgage, the administrator took some proceedings toward a partition of the land, and caused it to be subdivided into seven parts or lots, and the defendants released the mortgage upon a portion of the land, restricting it to the lots or portions intended to fall by the partition to the plaintiff. But no partition was ever effected, nothing further having been done in regard to it than the filing of a petition praying for a division of the property.

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The heirs were minors, and an order for the convocation of a family meeting was rendered, and beyond that no legal steps were taken in the matter.

The defendant in injunction could expect only to be paid concurrently with other creditors of the estate in the due course of administration. The proceedings taken are illegal and irregular, and the decree of the lower court perpetuating the injunction we regard as having been properly rendered.

Judgment affirmed.

No. 3868.

THE BRITISH AND AMERICAN STEAMSHIP NAVIGATION COMPANY,
Limited, et al. v. SIBLEY, GUION & Co. et al.

This is a claim for damages for the illegal attachment of the plaintiffs' vessel in the suit of Sibley, Guion & Co. v. Fernie Brothers & Co. There was no just ground for seizing this vessel as the property of Fernie Brothers & Co., but there is some difficulty in fixing the damages to which plaintiffs are entitled. The true standard seems to be the expenses incurred and profits lost as the direct consequence of the seizure and detention and as far as they are ascertainable on the part of the plaintiffs.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Lea, Finney & Miller*, for plaintiffs and appellants. *Campbell, Spofford & Campbell*, for defendants and appellees.

HOWELL, J. The plaintiffs claim \$30,000 damages for the illegal attachment of their vessel in the suit of Sibley, Guion & Co. v. Fernie Brothers & Co. in the Fourth District Court of New Orleans.

The defendants excepted that there is no such corporation as the plaintiffs, and answered that Fernie Brothers & Co., of Liverpool, with the purpose of defrauding their creditors and obtaining a fictitious credit, conveyed to the plaintiffs' company certain ships, which sailed under registers in their names, and were consigned to a firm in New Orleans, of which they, the Fernies, with other firms were members; that the control of said ships was in said firms, and no evidence of any title was carried by said vessels in the name of said company; that said Fernie Brothers & Co. obtained a large credit upon the apparent ownership of said vessels, including the one claimed by plaintiffs, who are chargeable with the frauds of said firm, and that if there was a transfer of said vessel to the plaintiffs there was no delivery. From a judgment in favor of defendants the plaintiffs have appealed.

The plaintiffs have satisfactorily established their incorporation and

their ownership of the vessel which was attached by the defendants. They acquired the vessel before the claim upon which the attachment issued existed, and have sufficiently shown the various antecedent transfers. After the attachment, evidence of plaintiffs' ownership was exhibited to the defendants and they released the seizure. We think the evidence shows that there was no just ground for seizing this vessel as the property of Fernie Brothers & Co. at the date of the attachment. The defendants were informed at the time that the vessel belonged to plaintiffs, and that the register which they examined in the office of the British consul at New Orleans was not evidence of ownership, while there was in said office a mercantile navy list and maritime directory showing the plaintiffs to be the owners. We are satisfied that they were the owners at the date of the seizure; but we have some difficulty in fixing the damages to which they are entitled. The true standard seems to us to be the expenses incurred and profits lost in consequence, directly, of the seizure and detention, which should be ascertainable on the part of the plaintiffs. They have shown an item of \$213 for drayage of goods returned to shippers, telegrams, etc., and of \$500 legal expenses. In addition to these items they are entitled to the expenses of the "officer and crew list," extra wharfage, etc., during the seizure, which, from the evidence, we will fix at \$100 per day for fifty-two days, \$5200. Some witnesses speak of \$200 per day for what is incorrectly called demurrage, that is, indemnity for the privation of the use of the ship during her detention; but when questioned as to the actual expenses during that time, about half that sum is stated. They are also entitled to the difference between the amount of the total passenger and freight list and the running expenses, but the evidence on this point is even more vague than on the former. With the view, however, of closing the litigation we will deduct the expenses fixed by two witnesses at \$200 per day for twenty days, \$5000 from the amount for freight, \$11,381 30 which it is said the vessel could have carried in addition to the quantity carried after the release, leaving the sum of \$6381 30. These three items (\$213, \$500, \$5200) and \$6381 30 make the sum of \$12,294 30 as the damages sustained. We are aware that these figures are not based on absolute data, but the plaintiffs have not furnished the requisite proof for any better calculation, and we think they have suffered damage to this amount by the wrongful acts of the defendants.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiffs recover of the defendants, Sibley, Guion & Co., *in solido* the sum of \$12,294 30 and all costs in both courts.

Mrs. Emily Heyman v. The Sheriff of East Feliciana et al.

No. 5612.

MRS. EMILY HEYMAN v. THE SHERIFF OF EAST FELICIANA et al.

The judgment of separation between plaintiff and her husband was a nullity because it was not executed by a giving in payment or by a *bona fide* non-interrupted suit to obtain payment as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

The conveyance under which plaintiff claims the property seized is covered by neither of the three cases mentioned in article 2446; and in the language of article 1790, such contract between husband and wife is forbidden.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J. D. C. Hardee*, for plaintiff and appellant. *W. F. Kernan*, for defendants and appellees.

WILY, J. On twelfth July, 1856, Mrs. Emily Heyman obtained judgment of separation of property and for one thousand dollars against her husband, on the admissions contained in his answer and the testimony of one witness, to the effect he was in embarrassed circumstances.

In May, 1853, this judgment was published and execution issued, under which the plaintiff bought a lot of ground on the nineteenth December, 1858, crediting the judgment four hundred and thirty-seven dollars and forty-six cents.

On twelfth February, 1869, more than twelve years from the rendition of the judgment, it was revived by decree of court on a petition, the service of which was accepted by A. M. Heyman on second February, 1869.

On twenty-first October, 1869, Heyman sold to his wife a lot of ground and buildings thereon in the town of Clinton for two thousand dollars, one thousand and eighty-five dollars thereof in settlement of the balance due on said judgment of his wife against him, and nine hundred and fifteen dollars thereof on the assumption of his wife to pay certain creditors of the seller, her husband, and it is conceded these creditors were paid.

On twenty-ninth September, 1873, L. Bloom & Co. obtained judgment against A. M. Heyman on his note dated July 19, 1872; and on this judgment execution issued, and the house and lot in Clinton, conveyed by Heyman to his wife, as aforesaid, were seized, whereupon she sued out an injunction and prayed to be decreed the owner of the property.

The court dissolved the injunction and condemned Emily Heyman to pay L. Bloom & Co. forty-two dollars and sixty-three cents general damages, and fifty dollars special damages, attorney's fees.

From this judgment the plaintiff appeals.

The defense urged is as follows:

First—The pretended judgment of separation of property is a fiction,

a mere voluntary separation, the nullity of which can be invoked by any one at any time. 6 An. 730; 7 An. 92; 2 An. 483; 4 An. 65.

Second—It was not followed up by a prompt and *bona fide* execution, an uninterrupted suit to obtain payment, as required by article 2428 Revised Code. See also 1 R. 431; 4 An. 513; 11 An. 696; 12 An. 193.

Third—The money demand granted in said judgment expired by the prescription of ten years, no revival of said judgment having been obtained within ten years from its rendition, as required by article 3547 of the Revised Code. See, also, 21 An. 295.

Fourth—The sale of the property in controversy by Heyman to his wife was an absolute nullity, being in contravention of a prohibitory law. Revised Code, articles 1790, 2446; 21 An. 466; 12 An. 173; 18 An. 27; 4 An. 65.

It is true the defendants, L. Bloom & Co., judgment creditors of the husband of plaintiff long after the separation of property, can not attack the judgment on the ground that it was collusive and rendered in fraud of creditors, 24 An. 49; still their seizure can be maintained if the conveyance of the property in question from Heyman to his wife in October, 1869, was an absolute nullity, because made in contravention of a prohibitory law.

Article 1790 of the Revised Code provides that: "Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as husband and wife, tutor and ward, whose contracts with each other are forbidden, or in relation to the subject of the contract, such as purchases by the administrator of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of her husband, to alienate her dotal property or to become security for his debts. These take place only in the cases specially provided by law, under different titles of this code."

Article 2446 of the Revised Code provides that: "A contract of sale between husband and wife can take place only in the three following cases:

First—"When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

Second—"When the transfer made by the husband to the wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

Third—"When the wife makes a transfer of property to her husband in payment of sums promised to him as dower."

Under these articles of the Revised Code, we are constrained to hold that the conveyance in October, 1869, of the property in question from

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Heyman to his wife for two thousand dollars, one thousand and eighty-five dollars thereof in discharge of the balance due on her judgment against him, and nine hundred and fifteen dollars thereof in the assumption of the wife to pay certain creditors of her husband, was an absolute nullity.

The conveyance is covered by neither of the three cases mentioned in article 2446, and in the language of article 1790 such contract between husband and wife was "forbidden." And this view of the law was taken by this court in *Spurlock v. Mainer*, 1 An. 302; a case directly in point, and the ruling has prevailed ever since.

We will also remark that the judgment of separation was a nullity, because it was not executed by a giving in payment or "by a *bona fide* non-interrupted suit to obtain payment," as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

It is therefore ordered that the judgment herein be affirmed, appellant paying costs of appeal.

No. 5633.

THOMAS H. HUNT v. MRS. A. V. GRAVES.

The land in controversy having been sold as the property of R. W. Graves, and his legal representative—the curator or administrator of his succession—having been cited to answer both the original and amended petitions claiming said land, and issue joined thereon as to him, the judgment for the land according to the corrected description was proper, but the judgment for the rent was erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of trespass of their mother, now deceased, as well as their father. They could only accept with benefit of inventory, and take the succession of their mother after its debts were paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.

A PPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & W. Farrar*, for plaintiff and appellee. *A. W. Roberts*, for defendant and appellant.

HOWELL, J. This is a petitory action, in which plaintiff seeks to recover a tract of land described in his petition and purchased by him at sheriff's sale, which he alleges was taken possession of and held by the defendant against his consent and wish, and also the rent thereof and damages during the wrongful occupancy of the defendant, who answered that the said land, constituting a plantation, is the property of the succession of her deceased husband, and called the administrator in warranty.

Before the administrator made appearance the defendant died, and

on motion of plaintiff's counsel the case was revived in the name of her legal representatives.

The administrator of the deceased husband answered, admitting that when he qualified he found the defendant in possession, and he permitted her, as widow in community, to remain so until her death, and that the plantation is now in the possession of her heirs, and he denied that the plaintiff has any right to said property.

R. L. Graves, the tutor of the minor children, also answered, adopting the answer of the defendant, and denying that either the widow (the defendant) or himself, in his representative capacity, was ever in possession of the property claimed by plaintiff.

Whereupon, the plaintiff, finding the property erroneously described in the sheriff's deed, filed an amended petition, giving a corrected description thereof, and explaining how the error occurred, and prayed that R. L. Graves, individually, as one of the heirs and as tutor of the minor heirs, alleged to be then in possession, be cited to answer the amended petition; that he be declared owner of the land described in the amended petition; that the deed of the sheriff to him be corrected, and, in other respects, prayed as in the original petition. Citation on the amended petition was issued to and served only on the tutor of the minors and the curator of the deceased husband and father. A judgment by default was taken "against defendant, on failure to answer the amended petition," and confirmed "on proof in favor of plaintiff." This judgment was rendered against "defendant's" correcting the description of the land, according to the adjudication to plaintiff, and condemning the "defendant" to pay the sum of five hundred dollars per annum for the rent of said property for four years, and at the same rate until possession is given to plaintiff, for which a writ was allowed.

The plaintiff entered a remittitur for the rent of the last two years mentioned in the judgment after it was signed, and the tutor of the minor heirs appealed. His counsel assigns as error "that he was the only defendant, and was cited only as tutor, not as possessor individually; that minors can not be held liable as claimed; that the plaintiff, by the amended petition, abandoned the suit for rent on the property first described, and does not claim it on the other; that the judgment for rent against him as tutor, he being the only person cited, is in error; that the question of correcting the deed could not be tried without proper parties; that it was necessary to make the sheriff a defendant; that defendant could not correct the deed of the sheriff; that motion for a new trial was overruled when plaintiff admitted the judgment to be for too much; that the remittitur could not be filed after the judgment was signed, and if filed could not affect the motion for a new trial."

Hunt v. Mrs. Graves.

The land having been sold as the property of R. W. Graves, and his legal representative (the curator or administrator of his succession) having been cited to answer both petitions, and issue joined thereon as to him, we think the judgment for the land, according to the corrected description, was proper; but it seems clear that the judgment for the rent, as rendered, is erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of their mother, as complained of. They can only accept with benefit of inventory, and take the succession of their mother after its debts are paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.

It is therefore ordered that the judgment for rent be reversed, with costs in favor of the tutor, and that in other respects it be affirmed. Appellee to pay costs of appeal.

No. 5632.

CHRISTOPHER HUNT v. JOHN MAYO.

Under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk and sheriff. The drawing for the term was made by the parish judge, clerk, recorder and the sheriff. Therefore, all the officers required by law to draw the panel were present and officiated in the act. The placing in the order of the judge for the drawing at that term, the additional officer—the recorder—was, doubtless, an oversight, and may be regarded as surplusage. The objection to the drawing has no weight.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J.* Criminal case. *B. J. Bowman*, for plaintiff and appellee. *R. A. Hunter*, for defendant and appellant.

TALIAFERRO, J. This is a suit for slander and defamation of character. The plaintiff, who is the pastor of a Methodist church at Alexandria, complains that, on a public street in that town, he was met by the defendant, who wantonly and maliciously abused and slandered him, by repeatedly calling him "a damned thief," and applying to him other slanderous epithets in the presence and hearing of a number of persons, one of whom is a member of the church presided over by the plaintiff. He claims damages against the defendant for the sum of two thousand dollars.

The defendant puts in a general denial, and alleges that if on the occasion referred to in plaintiff's petition the defendant did use harsh language in reference to the plaintiff, he was justified in so doing by having previously received insult and abuse of an outrageous character from the plaintiff.

The case was tried before a jury, who found a verdict against the defendant for one thousand dollars, from which he has taken this appeal.

An exception was taken to the panel of jurors drawn for the May term of the district court. The objection is that under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk and sheriff; that the drawing for the said term was made by the parish judge, clerk, *recorder* and sheriff. The objection, we think, has no weight. All the officers required by law to draw the panel for the May term were present and officiated in the act. The placing in the order of the judge for the drawing at that term the additional officer, the "recorder," was, doubtless, an oversight of the judge, and may be regarded as surplusage. The objection was properly overruled.

There are two other bills of exception in the record, which it is unnecessary for us to pass upon.

We have in the record before us a mass of testimony taken on the trial of the case in the court below, which displays the existence of much acrimony of feeling among the friends of the parties to this suit, who are colored men of respectable standing in the community in which they reside. We find nothing in the evidence and an attentive review of the case that authorizes us to alter the verdict and judgment of the lower court.

Judgment affirmed.

No. 5655.

MRS. MARY E. HALSEY v. P. S. SANDIDGE AND J. A. PAYNE.

The testimony of J. H. Halsey, a brother of the plaintiff, was offered in evidence to show that a certain piece of land belonged to her at the time of her marriage to her present husband, one of the defendants in this case, and that she acquired it at a sheriff's sale. The testimony was objected to on the part of the defense on the ground that it was an attempt to establish, by parol, title to real estate, which requires written evidence. The bill of exception to the admission of such proof was well taken.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J. R. T. Posey, S. P. Greves, J. H. Halsey*, for plaintiff and appellee. *J. & G. W. Burgess* and *Andrew S. Herron*, for J. A. Payne, defendant and appellant.

TALIAFERRO, J. In this case the plaintiff, who is a married woman, sues her husband and James A. Payne *in solido* to recover from them two promissory notes, each for the sum of one thousand dollars, which notes she alleges are her separate paraphernal property, placed by her said husband in the hands of the other defendant, James A. Payne, as collateral security for the payment of one thousand dollars owing to said Payne by her husband, the said P. S. Sandidge. She prays that the said notes be restored to her, or, if disposed of by the defendants,

Mrs. Halsey v. Sandidge and Payne.

that she have judgment for the amount of the notes. Interrogatories on facts and articles were propounded to the defendants, each of whom answered them at great length. A bill of exceptions was reserved to the admission of the testimony of Sandidge, on the ground that he, the husband, could not testify against Payne in favor of his wife, Mrs. Sandidge. This testimony, however, was afterward stricken out.

The plaintiff alleges that the two notes sued upon were received by her in part payment for a tract of land, her separate property, sold by her to John Yoist, of Pointe Coupee, in the year 1870, the land having been acquired by her previous to her marriage with the defendant, Pleasant S. Sandidge. J. H. Halsey, a brother of the plaintiff, Mrs. Sandidge, testified that the land sold by Mrs. Sandidge to Yoist belonged to her at the time of her marriage to her present husband, and that she acquired it at a sheriff's sale. The testimony of Halsey was objected to on the part of the defense, on the ground that it was an attempt to establish by parol, title to real estate, which requires written evidence. A bill of exceptions was reserved to the admission of the proof. We regard the action of the plaintiff so far as it is brought against her husband in this case as altogether null and without effect. The exception just noticed was well taken and must be sustained.

It is ordered that the judgment of the lower court which was rendered in favor of the plaintiff against the defendants *in solido* for \$1000, be annulled and avoided. It is further ordered that this suit be dismissed as of nonsuit, the plaintiff paying costs in both courts.

No. 3553.

CHISM & BOYD v. P. J. LEFEBRE.

This is a contract about a wall claimed to be in common. Buckner bought only what his vendors could sell. Not having paid one-half the cost of erecting the wall, they did not own half of it, and could not sell the half thereof. Buckner's ignorance of the want of title to one-half of the wall in his vendors should not prejudice the plaintiffs, if it operate a hardship to him. His becoming owner of all the premises owned by his vendors conferred no immunity upon him to use the wall as a wall in common, free of charge. He acquired by his purchase only the right which his vendors had to make the wall one in common by paying half the cost of erection. Availing himself, as it seems he has done, of the benefit of the wall, it is but fair he should pay for one-half the expense incurred in building it.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Randolph, Singleton & Browne*, for plaintiffs and appellants. *Bermudes & Olaiborne*, for Lefebre, defendant and appellee. *Gilmore & Sons*, for Buckner, defendant and appellee.

TALIAFERRO, J. The plaintiffs having, as they allege, caused to be erected on the division line between their property and that of the

defendant a substantial and costly brick wall, which the defendant is now using, and thereby making it a wall in common, and therefore bound to pay the plaintiffs one-half the expense of erecting it, which they set out to be the sum of \$760 50, the defendant filed an exception alleging that he is not the sole owner of the property stated to belong to him; that his coproprietor is the succession of John Lefebvre, and until his coproprietor is made a party he is not bound to answer. After this exception was filed in August, 1869, the share of Lefebvre, the defendant, in the property, and also the portion of it that belonged to the estate of John Lefebvre, were both acquired by H. S. Buckner, who was thereupon made a party defendant, and judgment prayed for by the plaintiffs against him as owner in possession and using the wall as a wall in common. Buckner excepted that he can not be made a party defendant to the suit in the form in which it is attempted. The court sustained the exception and dismissed the suit as to Buckner. The plaintiffs have appealed.

The defendant contends that as between the plaintiffs and Buckner there is no priority of contract or engagement, and no *quasi* contract from which liability might result. That he derived no benefit from the disbursements made by the plaintiffs, for the price paid by him included the value of the new wall as it stood at the date of the sale. The benefit, if any, was conferred upon his predecessor in the title. It is urged also that Buckner had no notice of the plaintiffs' claim; that this claim or demand of the plaintiff was not recorded, and third parties ought not thereby to suffer. The plaintiffs hold that Buckner's vendors, not having contributed to the building of the wall, had no interest in it, and that they could convey no greater interest or right than they had. The plaintiffs say no law requires them to record their claim; that the wall being a two or three-story wall is not presumed by law to be a wall in common (Civil Code, article 677;) that Buckner having purchased after plaintiffs instituted suit, had notice of their claim; that he had no right to suppose the wall was a wall in common, and was bound to inquire of his vendors whether they owned one-half of the wall.

We are inclined to adopt for the most part the reasoning of the plaintiffs. Buckner bought only what his vendors could sell. Not having paid one-half the cost of erecting the wall, they did not own half of it, and could not sell half of it. Buckner's ignorance of the want of title to one-half the wall in his vendors should not prejudice the plaintiffs, if it operate a hardship on him. His becoming owner of all the premises owned by his vendors conferred no immunity upon him to use the wall as a wall in common free of charge. He acquired by his purchase only the right which his vendors had to make the wall

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one in common by paying half the cost of erection. Availing himself as it seems he has done, of the benefit of the wall, it is but fair he should pay for one-half the expense incurred in building it.

The case before us seems closely in point with that of *Winter v. Reynolds*, 24 An. 113. There the court said: "The defendant uses the party wall and neither he nor any one else has paid the plaintiff the half of its cost. It would seem that he is liable." 20 An. 553; 22 An. 114. With these views we think the exception should be overruled and the case remanded for further proceedings.

It is therefore ordered that the exception taken by defendant to the plaintiffs' right to sue be overruled and set aside. And it is further ordered that this case be remanded to the lower court to be proceeded with according to law, the defendant and appellee paying costs of this appeal.

ON REHEARING.

WILY, J. After further examination of the case we have come to the conclusion that our former judgment herein is correct.

It is therefore ordered that the judgment of this court, rendered on the thirtieth November, 1874, remain undisturbed.

No. 5666.

MRS. S. C. LANE v. JOSHUA G. CLARKE—HEIRS OF LANE et als.

Intervenors.

The certificate of the clerk of the court *a qua* as to all the matters in regard to plaintiff, defendant, and the intervenors who have appealed, is sufficiently full. The proceedings as to the intervenor Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect the parties.

The record shows that the citations on the intervenors were served, but before the specified delay expired, and before issue was formed thereon either by default or otherwise, the plaintiff caused the default taken by her, against the defendant to be confirmed and the intervention dismissed. This was irregular and premature. Issue should have been joined.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & W. Farrar*, for plaintiff and appellee. *J. W. Montgomery*, for defendant and intervenors, appellants.

HOWELL, J. A motion is made to dismiss this appeal on the grounds:

First—That one Bender, who was an intervenor, is not made a party. The record shows that his intervention was dismissed as of nonsuit, and he has not appealed. He therefore has no interest in maintaining the judgment between plaintiff and defendant, and is not a necessary party to the appeal. He is no longer a party to the suit.

Mrs. Lane v. Clarke.

Second—The certificate of the clerk is not full and unqualified that the record contains all the testimony adduced, all the documents filed and all the proceedings had on the trial.

It certifies as to all these matters in regard to plaintiff, defendant, and the intervenors who have appealed. The proceedings as to the intervenor Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect said parties. The motion to dismiss is therefore overruled.

ON THE MERITS.

The intervenors, the heirs of Lane and Ed. Waller, have appealed from a judgment dismissing their interventions as of nonsuit, and assigned for error "that the district judge permitted their interventions to be filed and ordered to be served; that before citations could be served and returned, the plaintiffs caused their interventions to be dismissed, when no issues or answers were filed either by the plaintiff or defendant."

The record shows that the citations on the interventions were served, but before the specified delay expired, and before issue was formed thereon either by default or answer, the plaintiff caused the default taken by her against the defendant to be confirmed and the interventions dismissed. This, under the authority of *Perkins v. Perkins*, 20 An. 257, was irregular and premature. Issue should have been joined.

It is therefore ordered that the judgment appealed from as to the appellees and appellants be reversed, and the cause remanded to be proceeded in according to law. Costs of appeal to be paid by appellees.

No. 4665.

UNION NATIONAL BANK v. WILLIAM H. COOLEY AND D. C. LABATT.

The defense that the indorser of a promissory note was released by the fact that the bank, without his knowledge or consent, gave up a warrant which had been pledged as collateral security, must be sustained. The indorser contends very properly that he could have made the warrant available, had it been retained and he required to pay the debt.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Carleton Hunt*, for plaintiff and appellee. *D. C. Labatt* and *T. J. Semmes*, for defendant and appellant.

LUDELING, C. J. This is a suit against the indorser of a promissory note, who alleges that he was released by the fact that the bank gave up a warrant, which had been pledged as collateral security, without

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his knowledge or consent. It appears the warrant had no validity, and, consequently, that the indorser was not in any manner affected by the giving up of the warrant, which had no value.

It is therefore ordered that the judgment be affirmed with costs.

ON REHEARING.

HOWELL, J. We held in our former opinion that the warrant which had been given as collateral was of no validity, and, consequently, the indorser was not in any manner affected by the giving of it up. It seems, however, that the warrant was valid and had value, and hence the return of it by the plaintiff to the principal debtor without the knowledge or consent of the indorser or surety was an injury to the latter. He contends, very properly, that he could have made the warrant available had it been retained and he required to pay the debt.

It is therefore ordered that our former decree be set aside; that the judgment against the appellant, D. C. Labatt, be reversed, and that there be judgment in his favor with his costs.

No. 5677.

JESSE A. MATHEWS v. PETER H. KEMP et al.

The judge *a quo* erred when he refused the surety the right to have the property of the principal discussed, he having pointed out the same and furnished the necessary money.

A PPEAL from the Sixth Judicial District Court, parish of St. Helena. *E. F. Russel*, acting judge. *J. M. Wright*, for plaintiff and appellee. *T. & E. J. Ellis*, for defendant and appellant.

MORGAN, J. The suit is upon the following obligation :

"Twelve months after date I, P. H. Kemp, as principal, and T. B. Kemp and S. W. Kemp, as securities, promise to pay Jesse A. Mathews, or bearer, twelve hundred (\$1200) dollars for value received.

January 1, 1873.

(Signed)

P. H. KEMP,
T. B. KEMP,
S. W. KEMP.

T. B. Kemp and S. W. Kemp pleaded that they were securities only, pointed out property of the principal, and deposited money to have it discussed. There was judgment *in solido* against them all. T. B. Kemp appeals.

The question we have to determine (all others having been abandoned), is as to the appellant's plea of discussion. Is he bound as principal, or is he only bound as surety? It seems to us the question

is answered, in terms, by the instrument sued upon. In this view of the case the judgment which refused the surety the right to have the property of the principal discussed, he having pointed out the same, and furnished the necessary money therefor, is erroneous.

It is therefore ordered, adjudged and decreed, that the judgment of the district court as regards the appellant, T. B. Kemp, be avoided, annulled and reversed, and that the case be remanded to be proceeded with according to law, appellee to pay the costs.

No. 5675.

N. K. KNOX v. POLICE JURY OF EAST BATON ROUGE.

As the police jury of East Baton Rouge has laid out a public road on the land of the plaintiff without allowing the jury of freeholders to assess such damages as he may sustain thereby, it has acted in violation of the law, and the plaintiff has the right to appeal to the court for an injunction restraining the police jury from illegally divesting him of his property.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J. J. O. Fuqua*, for plaintiff and appellant. *George A. Griffith*, for defendant and appellee. *A. S. Herron*, for intervenors.

WYLY, J. One hundred and ninety-eight citizens of the parish of East Baton Rouge petitioned the police jury to establish a public road connecting the Jones Creek Road with the Clay Gut Road, extending across the land of the plaintiff, N. K. Knox; and on the fifth of August, 1873, the police jury passed the following ordinance:

"Be it resolved by the police jury in and for the parish of East Baton Rouge and State of Louisiana, That the right of way, as prayed for in the petition of one hundred and ninety-eight citizens, be and the same is hereby granted; *provided*, that the same shall not cause any expense to the parish; and, *provided, further*, that said road shall not be opened to the public until after all the crops liable to damage therefrom shall have been harvested.

"Resolved, That the president appoint a committee of six freeholders to lay out said road."

The president appointed a committee in accordance with the foregoing resolution.

The plaintiff alleges that said committee laid out said road across his land without notifying him of the time when they would make the location, and he fears they have made a report of their action to the police jury, recommending the adoption of said road; and he fears that said report will be adopted at the next meeting of the police jury. Wherefore, he appeals from the decision of said committee, and prays

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for an injunction, which was granted, restraining the police jury from adopting said report and establishing said road for the following reasons :

First—Because his property can not be taken for a public road without adequate compensation for the damages incurred by him thereby ; and as the police jury expressly authorized the road with the understanding that it shall result in no expense to them, they do not contemplate paying the damages that plaintiff may incur.

Second—The law requires the committee to be appointed by the police jury ; whereas here it is appointed only by the president of the police jury.

Third—Plaintiff avers the members of the committee were not sworn as required by law before proceeding to lay off the road.

Fourth—Petitioner was not notified of the time and place of the meeting of said committee for the purpose of locating said road.

Petitioner further alleges that if said road is established as prayed for it will cause him damages in the sum of one thousand dollars, as he will be compelled to keep up two lines of fence, each about half a mile long, besides the cutting of his land in two parts, thus making its use and cultivation more difficult and expensive.

The answer admits that the road was laid out by the police jury, and avers that everything required by law was done. The defendant prays for the dissolution of the injunction and two hundred dollars damages. The court dissolved the injunction, with seventy-five dollars damages, and the plaintiff appealed.

The police jury has the right to lay out public roads, and under section 3368 of the Revised Statutes "it shall be lawful for any individual, through whose land the police jury shall cause a public road to be laid out, to claim a just compensation therefor."

Section 3369 provides that "all roads to be hereafter opened and made shall be laid out by a jury of freeholders, consisting of not less than six inhabitants of the parish where said road is to be made, to be appointed for that purpose by the police jury ; it shall be the duty of said jury of freeholders to trace and lay out such road to the greatest advantage of the inhabitants and as little as may be to the prejudice of inclosures, and assess such damages as any person may sustain. They shall take the following oath. * * * All damages assessed by the said jury to an individual, through whose land the road may run, shall be deemed a parish charge, and be paid by the treasurer of said parish." * * *

Section 3370 provides that "whenever any individual through whose land a road laid out as aforesaid shall pass may be dissatisfied with the decision of the freeholders laying out the same, either as to the

course the same is to take, or to the damages to him assessed, he may have an appeal to the district court for the parish in which said road lies, provided he prosecutes the same at the next session of said court after the laying out of the said road or the assessment of the damages; and no appeal shall be set aside for the want of form in bringing the suit before the court. Injunction to stay proceedings may be issued in said case when the case requires the same."

It is evident that the defendant, the police jury of the parish of East Baton Rouge, can not establish a public road on the land of the plaintiff without complying with the law conferring the power on said corporation to establish roads. It must appoint a jury of six freeholders, who shall take the oath provided by law, and who shall trace and lay out the road to the greatest advantage of the inhabitants and as little as may be to the prejudice of inclosures, and assess such damages as may be sustained by the person through whose land the road may run; and the person dissatisfied with the decision of the freeholders laying out the road, either as to the course the same is to take, or the damages to him assessed, may appeal to the district court of the parish in which the land lies.

As the police jury has laid out a public road on the land of the plaintiff without allowing the jury of freeholders to assess such damages as he may sustain thereby, it has acted in violation of the law, and the plaintiff has the right to appeal to the court for an injunction restraining the police jury from illegally divesting him of his property.

It is therefore ordered that the judgment herein be annulled, and it is decreed that the defendant be perpetually enjoined from establishing a road on the land of the plaintiff, unless it does so according to the provisions of sections 3368 and 3369 of the Revised Statutes of 1870.

It is further ordered that the defendant pay costs of both courts.

No. 5412.

STATE OF LOUISIANA v. JOE GUIDRY.

Before the jury was impaneled, defendant objected through his counsel to the impaneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court *quashed* in overruling the objection and proceeding to trial.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J.* Criminal case. *O. T. Dunn*, district attorney, *A. P. Field*, attorney general, for the State, appellee. *Thomas H. Olark*, for defendant and appellant.

MORGAN, J. "This is an appeal from the Fourteenth Judicial District Court for the parish of Richland. The defendant was convicted

and sentenced to ten years imprisonment at hard labor in the State penitentiary on a charge of shooting with intent to commit the crime of murder. When the defendant was brought to trial, and before the jury was impaneled, he objected through his counsel to the impaneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court overruled his objection and proceeded to the trial. The objection was embodied in a bill of exceptions which is the only point in the case. The judge's ruling was clearly wrong, and the judgment should be reversed. See Ray's Revised Statutes, 1870, section 791."

The foregoing is the brief of the Attorney General called upon to represent the State. We adopt it as the opinion of the court.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that this case be remanded to be proceeded with according to law.

No. 5582.

CHARLES E. ALTER v. HENRY SHEPHERD et als.

It is a rule of general jurisprudence, as well as a principle of public policy, to construe the redemption laws liberally. The object of the State is to collect the revenues, and not to deprive its citizens of any rights.

It is not to be deduced from the act No. 47 of the acts of 1873 that it takes away from creditors and all other parties interested, except the owner, the right of redemption which they had formerly enjoyed. If a mortgagee is a species of owner or quasi owner, as the doctrine is, he is embraced in the exception made by the express words of the statute.

To adopt a different conclusion it should clearly appear that the State, which has declared that the property of the debtor is the common pledge of all his creditors, intends by the process of collecting the contributions of its citizens and inhabitants to defeat absolutely all the rights of creditors upon property subject to those contributions. The right of the State to its necessary revenue is paramount, but it is to be exercised with a strict regard to those other rights which the State itself has granted or guaranteed, especially of parties not delinquent, except it expressly declares otherwise for exigencies which make the declaration necessary. Therefore the right of redemption still exists in the owner or quasi owner under the prescribed conditions.

It being shown that the defendant has a residence both in New Orleans and West Virginia, spending a large portion of the year in that city, and attending to mercantile and other business, the tender to effect redemption by plaintiff was properly made at the residence of the defendant in New Orleans, as it does not appear that he had an agent to represent him in such matters.

The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses.

The plaintiff should not, under the circumstances of the case, be concluded by her refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. M. M. Cohen, Clark, Bayne & Renshaw*, for plaintiff and appellant. *Hornor & Benedict*, for Shepherd, defendant

and appellee. *Alfred Grima*, for Mrs. Legardeur, defendant and appellee. *T. W. Baker*, for Mrs. Deynoodt, defendant and appellee.

HOWELL, J. The plaintiff, as holder of several notes secured by mortgage, sues to annul a tax sale of the mortgaged property and a subsequent sale thereof by the purchaser, on the grounds of alleged defects and informalities in the tax sale, collusion therein in the second sale, and his right as mortgagee to redeem the land, which he alleges he offered to do according to law within the legal delay. The defense is the general issue, a special denial of the alleged tender, and some special matters, with the prescription or lapse of the right of redemption.

Judgment was rendered in favor of the defendants, and the plaintiff has appealed.

We think the objections to the tax sale on account of alleged defects and irregularities are not sustained by the plaintiff, on whom the burden rested; and the first and most important question to be determined is, has a mortgagee the right to redeem?

It is a rule of general jurisprudence, as well as being a principle of public policy, to construe the redemption laws liberally. 1 R. 424. The object of the State is to collect its revenues, and not to deprive its citizens of any rights. It is well said: "In construing the redemption laws the courts hold that the word owner is a generic term, which embraces the different species of interest which may be carved out of a fee simple estate. This construction is the only one which can effectuate the intention of the Legislature and protect the interests of all parties concerned in the land sold for non-payment of taxes. In the same estate there may exist a fee simple or life interest or a household. The estate may have been mortgaged to secure a debt, and judgment creditors may have liens upon it, and the land may be in the adverse possession of a stranger to the title, and whose possession may be ripened into a right. Each is an owner, according to the extent of his interest or claim, and each has a right to protect his interest by a redemption from the tax sale. No one can complain of this; the government collects her tax, and the purchase money is refunded to him who claims under the tax sale. Take the case of the judgment creditor. The debtor, by collusion with the purchaser, might divest himself of title so as to defraud the creditor, unless the latter had the right to redeem, and thus disencumber the land and subject it to his lien. It may, therefore, be laid down as a general rule, that any right whether in law or equity, whether perfect or inchoate, whether in possession or action, amounts to an ownership in the land, and that a charge or lien upon it constitutes a person claiming it an owner, so far as it is necessary to give him the right to redeem." *Blackwell on Tax*

Titles, marginal p. 423. This doctrine is drawn by the author from many different authorities.

In the civil law a mortgage is considered to be a species of alienation, though not a sale—a real right upon property—a species of pledge, the thing mortgaged being bound for the payment of the debt, or the fulfillment of the obligation; the right of mortgage follows the property, into whatever hands it may pass, and the mortgageor can do no act to impair this right. R. C. C. 3278, 3279, 3282, 3397; 2 An. 168; 11 An. 68; 12 An. 776; 13 An. 2; 11 La. 408.

Counsel for the purchaser do not deny this interpretation of the word "owner," and admit that from 1847 to 1873 the laws of this State on this subject permitted any person interested in any land to redeem it when sold for taxes; but they contend that the act of 1873 (No. 47), under which this sale was made, limits the right of redemption to the "owners thereof, or their legally authorized agents;" and by section eleven of said act all laws or parts of laws conflicting with that act are repealed; and they say, "the deduction is inevitable, that the Legislature intended, by this last act, to take away from creditors and all other parties interested, *except the owner*, the right of redemption which they had formerly enjoyed."

Our deduction does not go so far as counsel seem to go. If a mortgagee is a species of owner, a *quasi* owner, he is embraced in the exception they make, that is, in the express words of the law. But as redemption laws are to receive a liberal interpretation, and as the act of 1873 does not expressly exclude mortgagees, we do not think their rights, as they existed prior to 1873, are so in conflict with those preserved in said act as to be embraced in the repealing clause. We think it should very clearly appear before we adopt the conclusion, that the State, which has declared that the property of the debtor is the common pledge of all his creditors, intends by the process of collecting the contributions of its citizens and inhabitants to defeat absolutely all the rights of creditors upon property subject to those contributions. The right of the State to its necessary revenue is paramount, but it is to be exercised with a strict regard for those other rights which the State itself has granted or guaranteed, especially the rights of parties not delinquent, unless it expressly declares otherwise, for exigencies which make the declaration necessary. The sole object of the State is to collect its revenues, and not to destroy rights, further than is absolutely necessary to effect such collection; and the right to redeem, we think, still exists in the owner or *quasi* owner, under the prescribed conditions.

The next question presented is, did the plaintiff assert this right in time and in a manner to secure its enforcement? He relies on a tender,

which he contends he duly and legally made before the expiration of the six months following the sale. It was formally made through a notary public at the residence of the purchaser, who was, however, absent at the time from the State. The purchaser says this was ineffectual, because he resided at the time and, to the knowledge of the plaintiff, was then in West Virginia; because no consignment of the money was made, and because he subsequently offered to receive the money and annul the sale to him; but the plaintiff refused his offer.

The evidence shows that the purchaser has a residence both in New Orleans and West Virginia, spending a large portion of the year in New Orleans, attending to mercantile and other business. Under the circumstances we think the offer by plaintiff was made properly at the residence here, it not appearing that the purchaser had an agent to represent him in such matters. C. P. 406, 407; R. C. C. 2168, No. 6.

It is said by the purchaser's counsel that it is unnecessary to determine whether or not the tender at the house of the purchaser was good, as it was not consigned by plaintiff, and when acceptance of it was afterward offered the plaintiff refused to pay.

The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential, in case the creditor refuses. C. P. 412; R. C. C. 2167. The plaintiff should not, under the circumstances, be concluded by his refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur, as the time for redemption had expired, and the purchaser denied the plaintiff's right to make a tender and redeem the land, as well as the regularity and effect of the tender as made. There was room for doubt upon this matter as a legal question, and plaintiff had already submitted it to a court of justice.

We conclude that the plaintiff as mortgager has the right to redeem, and that upon paying the purchaser the price and interest as prescribed by the act of 1873, the sales will be annulled and the property subjected to the mortgage sought to be enforced.

It is therefore ordered that the judgment appealed from be reversed, and that upon plaintiff paying to defendant, H. Shepherd, the sum of \$5860 47, the purchase price, with fifty per centum additional and all costs incurred by said Shepherd as purchaser, the tax sale of third of February, 1874, from M. Morgans, tax collector, to Henry Shepherd, and all subsequent sales of said property, be annulled. And it is further ordered that the plaintiff have judgment against Mrs. Solidelle Le Gardeur, wife of Joseph Deynoodt, for \$33,750, with eight per cent. interest on \$16,875 from fourth of January, 1873, and on like sum

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from fourth January, 1874, with five per cent. on the total of principal and interest for attorney's fees, costs of copies of notarial acts and costs of protest, with vendor's privilege and mortgage on the said property described in plaintiff's petition. The defendants and appellees to pay costs in both courts.

ON AMENDING THE JUDGMENT.

HOWELL, J. Upon the suggestion of counsel for defendant and the consent of plaintiff, the decree herein is amended to read as follows :

It is therefore ordered that the judgment appealed from be reversed, and that upon plaintiff paying to defendant, H. Shepherd, within ten legal days from this date, thirteenth March, 1875, the sum of \$5860 47, the purchase price, with fifty per centum additional, and all costs incurred by said Shepherd as purchaser, the tax sale of third of February, 1874, from M. Morgans, tax collector, to said Henry Shepherd, and all subsequent sales of said property be annulled. And it is further ordered that the plaintiff have judgment against Mrs. Solidelle Le Gardeur, wife of Joseph Deynoodt, for \$33,750, with eight per cent. interest on \$16,875 from fourth of January, 1873, and on like sum from fourth January, 1874, with five per cent. on the total of principal and interest for attorneys' fees, costs of copies of notarial acts and costs of protest, with vendor's privilege and mortgage on the said property described in plaintiff's petition. The right of plaintiff to enforce his said privilege and mortgage to be conditioned on his making the above payment within the time above prescribed. It is further ordered that the defendants and appellees pay costs in both courts.

No. 5552.

STATE ex rel. E. J. GAY v. JUDGE OF THE FIFTH JUDICIAL DISTRICT COURT.

The relator having applied for a rule on the sheriff to show cause why said sheriff should not retain in his hands a certain piece of property which he was going to release, and having prayed for an injunction in the meantime, the judge *a quo* refused the rule and injunction; the relator has appealed and applied for a mandamus to compel the judge to grant the appeal. The remedy is not by appeal from such a refusal. There was nothing done in the lower court for this court to revise.

APPPLICATION for a mandamus against E. F. Dewing, judge of the Fifth Judicial District Court, parish of Iberville. *A. and E. B. Talbot, Barrow & Pope*, for relator. *E. F. Dewing in propria persona. Matthews & Wailes, Alfred Shaw, for J. Supple*, respondent.

HOWELL, J. On a former application by this relator we refused a writ of mandamus to compel the granting of an appeal from an order

of the lower judge setting aside two previous orders and restoring an injunction against a writ of seizure and sale obtained by the relator. We based our refusal on the fact that the property subject to the mortgage being in the possession of the sheriff, the order reinstating the injunction would not work an irreparable injury and an appeal would not lie. See opinion book 44, page 58.

The sheriff, under his construction of our action in connection with that of the district judge anterior thereto, notified counsel that he would release the property, whereupon the relator, Gay, applied for a rule on the sheriff to show cause why he should not retain the same, and asked that in the meantime he be enjoined from releasing the seizure. The district judge refused to issue the rule and injunction, and the relator asked for an appeal from this refusal, which was denied, and he now asks this court for a peremptory mandamus to compel said judge to grant the appeal sought, and for a perpetual prohibition restraining the sheriff, the judge and the defendant, in the executory proceedings, from changing the possession of said property.

The foregoing statement shows that this is not a case for the writs sought. The judge simply refused to entertain or grant a rule and a provisional injunction as a sequence of the issuance of the said rule. The remedy is not by appeal from such refusal. There was nothing done in the lower court for us to revise.

It is therefore ordered that the writs of mandamus and prohibition herein prayed for be refused at the costs of relators.

No. 5598.

STATE ex rel. E. J. GAY v. JUDGE OF THE FIFTH JUDICIAL DISTRICT COURT and Sheriff of the Parish of Iberville.

In this instance, the property was in the hands of the sheriff under a writ of seizure and sale, and as this court does not find that said writ was set aside, it certainly was and is the duty of the sheriff to hold the property under the writ, until the injunction arresting its further execution is disposed of, notwithstanding the irregularities that have occurred. The writ of provisional seizure was expressly set aside and the injunction reversed, or rescinded, but the executory process was not annulled, nor ordered to be vacated. If the injunction has any force, it is in arresting the sale under said process. As the sheriff, however, has done what the relator seeks in this proceeding, and has possession of the property under the writ of seizure and sale, it is unnecessary to render the decree prayed for by said relator. The rule therefore must be dismissed, but the sheriff is ordered to hold possession of the property.

APPPLICATION for a writ of mandamus against E. P. Durand, sheriff of the parish of Iberville, and a rule to show cause why he should not be punished for contempt of court. *Barrow & Pope*, for relator. *Charles O. Lauve*, for E. P. Durand, sheriff.

HOWELL, J. This is a branch of the suit No. 5552 between some of the same parties, and the relator here alleges that after he applied in

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the lower court for the suspensive appeal, the sheriff of Iberville withdrew the keeper from the possession of the property seized in the suit of *Gay v. Supple*, thereby delivering to said defendant. After which the other sheriff was succeeded in office by E. P. Durand, upon whom the writs of mandamus and prohibition, just passed on, were served, and whom the relator then requested to comply therewith by taking into his possession the said property, improperly released by his predecessor; but the said Durand refused to do so, thus violating the writ of prohibition issued by this court, and he asks for a mandamus to compel said sheriff to obey the order of this court by taking possession of all the property seized by his predecessor in the said suit of *Gay v. Supple*, and that said sheriff be punished for contempt of court.

The sheriff in his answer recites all the proceedings in this matter, and states that upon receipt of the orders or writs from this court above alluded to he did take into his possession all the said property seized by his predecessor under the writ of seizure and sale in said suit of *Gay v. Supple*, and disclaims any contempt of court.

The difficulty in these somewhat irregular proceedings has grown out of the force and effect given by the district judge to the original injunction and the subsequent orders in relation thereto. There is, doubtless, some confusion and discrepancy as to the date of the seizure against which the injunction was first obtained. Our first opinion treated the seizure as having been made before the issuance of the injunction, and as it appears from the reasons given by the judge for refusing the appeal now sought that the injunction issued under the provisions of article 739 C. P., which, for specific causes, permits the arrest of the sale of property seized under the writ, we are justified in the supposition that the sheriff had made the seizure. This would have been the regular course in such cases. But if it is true as both parties seem to admit, that the sheriff had not taken actual possession of the mortgaged property when served with the injunction, it may well be considered that the judge's order to revive the injunction which had been set aside under article 307 C. P., was in its effect, under the circumstances, equivalent to the issuing of a new writ of injunction and that the seizure then existing was enjoined. The property was certainly in the hands of the sheriff under a writ of seizure and sale and we do not find that said writ was set aside, and it certainly was and is the duty of the sheriff to hold the property under the suit until the injunction arresting its further execution is disposed of, notwithstanding the irregularities that have occurred. The writ of provisional seizure was expressly set aside and the injunction reissued or

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reinstated, but the executory process was not annulled or ordered to be vacated. If the injunction has any force, it is in arresting the sale under said process.

As the sheriff, however, has done what the relator seeks in this proceeding and has possession of the property under the writ of seizure and sale, it is unnecessary to render the order prayed for herein. The object of relator's proceeding is accomplished.

It is therefore ordered that the rule herein be dismissed; *but it is ordered that the sheriff hold possession of the property.*

HOWELL, J. I can not concur in the addition of the last clause of the above decree, made a week after the same was entered in the minutes of the court and had by our rules become final, as I think it irregular and illegal, and materially changing the judgment without a hearing.

No. 3433.

JAMES M. CASS v. NEW ORLEANS TIMES.

The defendants in this case, by publishing the contents of an affidavit which was false and malicious, in the manner and with the comments they did, in a widely circulating newspaper, gave the false charges against the plaintiff an extensive circulation, and imparted to them an air of authenticity which they would not otherwise have had, and which this court may well suppose to have had a strong tendency to injure the character of the plaintiff. It is no justification to the defendants that they believed the affidavit to be true. Their belief in the truth of the charges tended rather to increase the bad effect of them against the plaintiff.

That defendants have condoned for the publication of the offensive article in which this suit originated, by publishing an exculpatory letter of the plaintiff's attorney, affords no escape from the responsibility in damages to the injured party. The reparation of the injury, to the extent that the publication of exculpating and explanatory matter may be supposed to have made reparation, may be considered, and goes only in mitigation of damages. Thousands may have read the libelous matter that never saw its refutation.

It does not avail to say that the defendants had no malice or ill feeling against the plaintiff. In all cases of this sort, where the charge is false, the law implies malice in the publisher, not malice in the sense of hatred, spite or revengeful feeling toward the party assailed, but as showing an evil disposition, the *malus animus* which induced him wantonly, recklessly or negligently, in disregard of the rights of others, to aid the slanderer in his work of defamation by giving to him the powerful influence of the public press—written or printed slander being justly considered more pernicious than that uttered by words only. In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment.

APPPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Jury trial. *McGloin & Kleinpeter*, for plaintiff and appellee. *W. H. Hunt, G. S. Lacey, A. W. Walker, James Lingan*, for defendants and appellants.

ON MOTION TO DISMISS.

HOWELL, J. The motion to dismiss this appeal, which has been

submitted to us during this month, was filed in May, 1871, two years since. The grounds of the motion are insufficient in themselves for a dismissal, the record appearing to be completed, and containing the petition of appeal and a bond in due form, and for a sufficient sum.

Motion refused.

ON THE MERITS.

TALIAFERRO, J. The plaintiff sues C. A. Weed, proprietor, and M. F. Bigney, editor of a newspaper called "The New Orleans Times," for one hundred thousand dollars as damages alleged to have been caused him by a false and malicious publication that appeared in that paper on the seventh of August, 1869, under the heading of "Charge of Embezzlement." The defendants are sued *in solido*. Weed having gone into bankruptcy, his assignee was made a party.

Weed avers that the publication complained of is contained in an affidavit in the records of the Second Justice's Court of New Orleans; that he knew neither party to the proceedings; that in the publication he made no averment of the truth of the same; that it was made without malice; that it is not libelous, and is within the legitimate province of journalism; that an article explanatory of the same was published in "The Sunday Times," at the instance of the plaintiff, without charge; that the gratuitous publication was demanded and yielded in full satisfaction of any injury plaintiff imagined he had suffered by the previous publication, and condoned any offense, if any had been done him, and that his resort now to a claim for damages is in bad faith, seditious, and calls for condemnation from the court. Bigney avers that he is not interested as a proprietor of the New Orleans Times, and that as employe he can not be held liable *in solido* with the proprietor of that paper; he denies the authorship of the article complained of, and says that he is not liable therefor; and for further answer he adopts the answer of Weed. The day following the alleged libelous publication a communication coming from the plaintiff's counsel was published in the Times, in which the whole matter, according to their views, was properly explained to the public. There does not appear to have been any agreement between the parties that this publication was to be in full reparation of whatever wrong may have been done to the plaintiff; notwithstanding the publication, the defendants' liability still remained, the explanatory article going only in mitigation of damages. The charge made by Hickey against the plaintiff was withdrawn. The case was several times tried by a jury. There was judgment for \$5000. This amount was thought to be excessive. The third jury gave a verdict for the plaintiff for \$1000, and from this verdict the defendants

appealed. Plaintiff answered the appeal, and prays that his damages may be increased to the amount claimed in his petition.

This controversy arose from an affidavit made before a justice of the peace of New Orleans, on the fifteenth of August, 1869, by one Edward Hickey. The affidavit is in these words:

"State of Louisiana—City of New Orleans. Edward Hickey being duly sworn declares that his residence has, during several years past, been in Texas, but that he is preparing for removal to Louisiana; that his letters have been, during one year past, more or less, by his instructions to his correspondents, addressed to him in the care of J. M. Cass, who resides in the city of New Orleans, and therein does business as a grocer; that lately, that is to say, in or about the month of July, Anno Domini 1869, said J. M. Cass, and one Albert Cass, his son, who was employed or occupied with his said father in his store, at 75 Poydras street of said city, did receive a packet or envelope with inclosures, addressed to affiant, and marked and superscribed as follows, to wit: "Value \$100. Mr. Edward Hickey, care J. M. Cass, New Orleans, La." that said packet was duly sealed with sealing wax, and stamped with three seals or impressions on said wax, which impressions were in the following words, to wit: "John Holland, manufr. of gold pens, Cincinnati," and when delivered to said J. M. Cass and Albert Cass contained one hundred dollars in current money, together with a certain blank deed, or deed unsigned, purporting that E. Hickey and — Hickey, his wife, did by such presents convey to said John Holland, his heirs and assigns, certain tracts of land situated in Missouri, for and in consideration of said sum of one hundred dollars. Affiant affirms that such funds belong to and were transmitted, or designed to be transmitted, to affiant by said Holland, in pursuance of a certain agreement of sale between affiant and him. He further declares that J. M. Cass, aided, assisted and abetted therein by said Albert Cass, his son aforesaid, did, contrary to the statutes and in violation of the peace and dignity of the State, tear, mutilate and break open such packet, addressed as aforesaid to affiant, and did therefrom extract, take, appropriate, embezzle, steal and carry away said one hundred dollars in lawful money, and that the same have never been received by affiant, owing to such felonious embezzling and stealing thereof by said J. M. Cass and Albert Cass.

Signed,

EDWARD HICKEY."

"Sworn and subscribed before me, the fifth day of August, 1869.

Signed,

A. SHELLEY, Second Justice Peace."

The declarations made in this affidavit were ushered forth to the world in the columns of the New Orleans Times, on the seventh of August, 1869, in an editorial article couched in the following language:

“Charge of Embezzlement.—An affidavit was yesterday made before A. Shelley, Second Justice of the Peace, by Edward Hickey, in which it is related that during the last year his letters, in pursuance of his instructions to his correspondents, had been directed to the care of J. M. Cass, grocer, who does business at 75 Poydras street, and such affiant charges that said J. M. Cass, aided and abetted therein by Albert Cass, his son, “did, in or about the month of July, contrary to the statutes, and in violation of the peace and dignity of the State, tear, mutilate and break open a certain packet addressed as aforesaid to affiant, and did therefrom extract, take, appropriate, embezzle, steal and carry away the sum of one hundred dollars in lawful money therein contained, and that the same have never been received by affiant, owing to such felonious embezzling and stealing thereof by said accused.” It is further related that said envelope contained an unsigned deed of sale importing that for said sum of one hundred dollars said Edward Hickey and his wife conveyed by such presents certain lands situated in Missouri to John Holland, of Cincinnati, whose seal was upon the envelope. According to the return of Officer Hoteht, to whom the writs of arrest in this case were intrusted, it appears that J. M. Cass, one of the accused, had gone on his annual business tour West, and could not be apprehended. The other accused, Albert Cass, was brought into court and gave bonds in the sum of \$500, with McGloin & Kleinpeter as sureties, for his appearance to answer the charge. We learn that Mr. Hickey was indebted to the house of J. M. Cass, from whom he had long purchased his supplies, for a bill of groceries amounting to \$109, got in June last, and that this summary proceeding on the part of the accused was merely a process of collection. We learn, also, that in addition to the deed to be signed by Hickey and wife the envelope contained a letter from Mr. Holland advising of the remittance inclosed, and requesting immediate execution of the deed of conveyance likewise transmitted, so that the accused were sufficiently advised, after having broken open the packet, that the money belonged to a stranger, who could not by any logic, however tortuous, be supposed willing or bound to pay Mr. Hickey’s bill. Thus to arrest and expropriate funds belonging to innocent third parties, in the course of their transit, should have a conspicuous heading in the category of crime. *A fortiori*, as the lawyers express it, if persons to whose care letters are addressed may with impunity break them open to satisfy either their avarice or curiosity, chaos has come again. We are told that the accused are exempt from penalties of a felonious breaking imposed under the statutory postal regulations of the United States, inasmuch as the packet was received by express and not through the post-office. The sureties upon the bond of Albert Cass, we are informed,

are the legal advisers of the father. The writ for the arrest of the latter will await in the hands of the constable his return, which will probably be hastened by that circumstance, as Mr. Cass is an old merchant of this city. T. B. Howard, Esq., appears for the prosecution."

The manner in which the writer of this article expresses himself is well calculated to impress the reader with the belief that he had confidence in the truth of the grave charges which he details as being contained in the affidavit. There is no saving clause or expression in his narrative of the contents of the affidavit even intimating that those charges may not be established. On the contrary, the tone and spirit of the article seem to display an effort to induce the belief that they were true. The inference may fairly be made that the writer himself believed the declarations of the affiant, and the obvious manifestation of that belief was well calculated to exert a malign influence against the fair character of the plaintiff. The affidavit itself, as simply a judicial proceeding, or an event happening in the usual course of administrative justice, is not published in its own terms without note or comment. But its contents are detailed conspicuously in an editorial article which would naturally attract to it more attention. Not only are the contents of the affidavit paraded before the public view, but they are treated of in language condemning in very forcible terms the conduct charged against the plaintiff; terms which do not leave the reader in doubt as to the writer's belief in the truth of the charges. Terms and expressions are used that indicate indignant feelings in the mind of the writer in relation to what he assumed to be the grave offenses of the plaintiff; offenses which he deemed entitled to "a conspicuous heading in the category of crime, and which, if allowed to pass with impunity," he thought would show that "chaos is come again."

The following letter from Hickey to J. M. Cass, in evidence, shows that he authorized the plaintiff to open the very letter that he afterward aimed to get up a criminal prosecution against him for opening:

"Sweet Home, Brashear City P. O., June 18, 1869.

"J. M. Cass, New Orleans :

"Dear Friend—Please say to Albert that he has neglected to pack up the yeast powders and mustard. If any letters are for me from Cincinnati, from John Holland, I wish you to see if any of them contain a small draft, and if so, advise me without delay. Send balance of letters on hand by mail to me, at Brashear City.

"Ever your friend,

Signed,

"E. HICKEY."

Albert Cass, a son, and at the time a clerk of the plaintiff, testifies that Hickey gave him verbal instructions to open any valuable packa-

ges that he might think contained money or drafts. The plaintiff swears that when this package was received and opened, he inclosed the letter that was from Holland to Hickey; that he informed him that the money was placed to his credit and was subject to his order; that afterward, when Hickey came to the city, he told him all the circumstances connected with the matter, and that he made no objections to the money being credited on the account of \$109 he owed the plaintiff, and promised to pay the balance.

The affidavit was false and malicious. The defendants, by publishing its contents in the manner and with the comments they did, in a widely circulating newspaper, gave the false charges against the plaintiff an extensive circulation and imparted to them an air of authenticity which they would not otherwise have had, and which we may well suppose had a strong tendency to injure the character of the plaintiff. It is no justification to the defendants that they believed the affidavit to be true. Their belief in the truth of the charges tended rather to increase the bad effect of them against the plaintiff. That they have condoned for the publication of the offensive article by publishing the letter of the plaintiff's attorney, affords no escape from the responsibility in damages to the injured party. The reparation of the injury to the extent that the publication of exculpatory and explanatory matter may be supposed to have made reparation, may be considered, and go only in mitigation of damages. Thousands may have read the libelous matter that never saw its refutation. Neither does it avail to say that the defendants had no malice or ill feeling against the plaintiff. In all cases of this sort, where the charge is false, the law implies malice in the publisher, not malice in the sense of hatred, spite or revengeful feeling toward the party assailed, but as showing an evil disposition, the *malus animus* which induced him wantonly, recklessly or negligently, in disregard of the rights of others, to aid the slanderer in his work of defamation by giving to him the powerful influence of the public press—written or printed slander being justly considered more pernicious than that uttered by words only.

In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment. 3 An. 69; 11 An. 206; see also case of *Perrett v. The New Orleans Times*, 25 An. 174, and various cases there cited. We think the decree of the lower court should remain unchanged.

Judgment affirmed.

MORGAN, J., *dissenting*. The following article appeared in the issue of the New Orleans Times of the seventh August, 1869:

"Charge of Embezzlement.—An affidavit was yesterday made before A. Shelley, Second Justice of the Peace, by Edward Hickey, in which it is related that during the last year his letters, in pursuance of his instructions to his correspondents, had been directed to the care of J. M. Cass, grocer, who does business at 75 Poydras street, and such affidavit charges that said J. M. Cass, aided and abetted therein by Albert Cass, his son, 'did, in or about the month of July, contrary to the statutes, and in violation of the peace and dignity of the State, tear, mutilate and break open a certain packet addressed as aforesaid to affiant, and did therefrom extract, take and appropriate, embezzle, steal and carry away the sum of \$100 in lawful money, therein contained, and that the same have never been received by affiant, owing to such felonious embezzling and stealing thereof by said accused.'

"It is further related that said envelope contained an unsigned deed of sale importing that for said sum of \$100 said Edward Hickey and his wife conveyed by such presents certain lands situated in Missouri to John Holland, of Cincinnati, whose seal was upon the envelope.

"According to the return of Officer Hotcht, to whom the writs of arrest in this case were intrusted, it appears that J. M. Cass, one of the accused, had gone on his annual business tour West, and could not be apprehended. The other accused, Albert Cass, was brought into court and gave bonds in the sum of \$500, with McGloin & Kleinpeter as sureties, for his appearance to answer the charge.

"We learn that Mr. Hickey was indebted to the house of J. M. Cass, from whom he had long purchased his supplies, for a bill of groceries amounting to \$109, got in June last, and that this summary proceeding on the part of the accused, was merely a process of collection. We learn, also, that in addition to the deed to be signed by Hickey and wife, the envelope contained a letter from Mr. Holland, advising of the remittance inclosed, and requesting immediate execution of the deed of conveyance likewise transmitted, so that the accused were sufficiently advised, after having broken open the packet, that the money belonged to a stranger who could not, by any logic, however tortuous, be supposed willing or bound to pay Mr. Hickey's bill. Thus to arrest and appropriate funds belonging to innocent third parties in the course of their transit, should have a conspicuous heading in the category of crime. *A fortiori*, as the lawyers express it, if persons to whose care letters are addressed may with impunity break them open, to satisfy either their avarice or their curiosity, chaos has come again.

"We are told that the accused are exempt from penalties of a felonious breaking imposed under the statutory postal regulations of the United States, inasmuch as the packet was received by express, and not through the postoffice.

"The sureties upon the bond of Albert Cass, we are informed, are the legal advisers of his father. The writ for the arrest of the latter will await in the hands of the constable his return, which will probably be hastened by that circumstance, as Mr. Cass is an old merchant of this city. T. B. Howard, Esq., appeared for the prosecution."

Plaintiff alleging that the whole of the above statement is false, malicious and libelous, institutes this suit against C. A. Weed, the proprietor of the newspaper, and M. F. Bigney, the editor thereof, for one hundred thousand dollars damages.

The case was several times tried by a jury. There was judgment for the plaintiff for \$5000. This amount was considered excessive, and a new trial was granted. The second attempt resulted in a mistrial. The third jury gave a verdict for the plaintiff for \$1000, and from this verdict the defendants appealed. Plaintiff answers the appeal, and prays that his damages may be increased to the amount claimed in his petition. Weed has gone into bankruptcy, and his assignee has been made a party to the suit.

Weed avers that the publication complained of is contained in an affidavit in the record of the Second Justice's Court of New Orleans; that he knew neither party to the proceedings; that in the publication he made no averment as to the truth of the same; that it was made without malice; that it is not libelous, and is within the legitimate province of journalism; that an article explanatory of the same was published in the Sunday's Times, at the instance of plaintiff, without charge; that this gratuitous publication was demanded and yielded in full satisfaction of any injury plaintiff imagined he had suffered by the previous publication, and condoned any offense, if any had been done him, and that his resort now to a claim for damages is in bad faith, seditious, and calls for condemnation from the court.

Bigney avers that he is not interested as proprietor of the New Orleans Times, and that, as employe, he can not be held liable *in solido* with the proprietor of that paper; he denies the authorship of the article complained of, and says that he can not be held liable therefor. Further answering, he adopts the answer of Weed.

The absence of Weed from the city, and the fact that the article was published during the time he was away, and the fact that Bigney was an employe of Mr. Weed's, the article having been inserted under his instructions, he having control of the columns of the paper during Weed's absence, although he never read it, does not release the one or the other, provided the article in question be libelous and improperly published.

The day following the alleged libelous publication, a communication coming from plaintiff's counsel was published in the Times, in which

the whole matter was, according to their views, properly explained to the public.

There does not seem to have been any agreement between the parties that this publication was to be in full reparation of whatever wrong may have been done to the plaintiff, and, notwithstanding the publication, defendants' liability still remained; the communication going to the effect of mitigation of damages.

The charge made by Hickey against the plaintiff was withdrawn.

The question remains, was the publication justified by the facts? The affidavit, which was made before a competent judge, and under which a warrant issued against the plaintiff, reads as follows:

"Edward Hickey being duly sworn, declares that his residence during several years past has been in Texas, but that he is preparing for removal to Louisiana; that his letters have been during one year past, more or less, by his instructions to his correspondents, addressed to him in the care of J. M. Cass, who resides in the city of New Orleans, and therein does business as a grocer; that lately, that is to say, on or about the month of July, 1869, said J. M. Cass, and one Albert Cass, his son, who was employed or occupied with his said father in his store, at 75 Poydras street of said city, did receive a packet or envelope, with inclosures addressed to affiant, and marked and superscribed as follows, to wit: 'Value \$100. Mr. Edward Hickey, care of J. M. Cass, New Orleans, La.,' that said packet was duly sealed with sealing wax, and stamped with three seals or impressions on said wax, which impressions were in the following words, to wit: 'John Holland, manufacturer of gold pens, Cincinnati,' and were delivered to said J. M. Cass and Albert Cass, containing one hundred dollars in current money, together with a certain blank deed unsigned, purporting that E. Hickey and — Hickey, his wife, did, by such presents, convey to said John Holland, his heirs or assigns, certain tracts of land situated in Missouri for and in consideration of said sum of one hundred dollars. Affiant affirms that such funds belong to and were transmitted, or designed to be transmitted, to affiant by said Holland, in pursuance of a certain agreement of sale between affiant and him. He further declares that J. M. Cass, aided, assisted and abetted by said Albert Cass, his son aforesaid, did, contrary to the statutes, and in violation of the peace and dignity of the State, tear, mutilate and break open such packet, addressed as aforesaid to affiant, and did therefrom extract, take, appropriate, embezzle, steal and carry away said one hundred dollars, in lawful money, and that the same have never been received by affiant, owing to such felonious embezzling and stealing thereof by said J. M. Cass and Albert Cass.

Signed,

"EDWARD HICKEY."

"Sworn to and subscribed before me, the eleventh day of August, 1869.

"A. SHELLEY, Second Justice of the Peace."

Cass v. New Orleans Times.

Now, this was a document filed in a judicial proceeding, and this document, I do not see any reason why the journal in question, as forming a part of the current of such proceedings in the courts of the day, could not publish. If it had been printed as written, it seems to me that no question of the journal's responsibility could have arisen. But the affidavit as sworn to, word for word, was not published. The facts are mentioned, but coupled with them are commentaries which, it is contended, constitutes the libel. But this is an error. It is not what may be said of a man's conduct in a stated case which damages him; it is the conduct of which he is charged. Now, the charges that the plaintiff had opened a letter; had taken therefrom money; had embezzled and stolen it, can not be aggravated by the commentary that "thus to arrest and appropriate funds belonging to innocent third parties, in the course of their transit, should have a conspicuous heading in the category of crime." And this, the affidavit out of the way, is the only matter approaching libel which I can find in the publication. It was not a libel to say that they had learned that Hickey was indebted to Cass for goods purchased some months before, and that this was merely a process of collection; nor to say that Mr. Holland's money had been taken to pay Hickey's debt, for such was the fact, unless Hickey had made the money his own by signing the deed which the money had been sent to pay, for the land which it conveyed, Nor that the sureties on Albert Cass's bond were the present plaintiff's counsel; nor that the return of J. M. Cass to the city, who is said in the article complained of, to be an old merchant of this city.

The cases of *Fresca v. Madox*, 11 An. 206, and *Perrett v. Times*, 25 An. 175, do not support the plaintiff's claim. In the former case the plaintiff was charged in the article with being a pirate, a nursing of crime, with being flushed with booty and bold through previous immunity, as a land and water rat, and a pet of criminal justice during many a day; as a brawny, thick-set, low-browed bandit, and to all appearances

"As mild a mannered man
As e'er scuttled ship or cut a throat;"

going far beyond the affidavit, assuming his guilt, and vilifying his character before the public. In the second case a magistrate was accused of the crime of highway robbery, and the relation thereof was published at the instance of entirely irresponsible parties.

In the case at bar the plaintiff was not accused, by the article complained of, of having committed any crime. It was simply related of him that a warrant had issued for his arrest upon an affidavit made before a tribunal of competent jurisdiction, and no expression of belief in his guilt was uttered.

There is, I think, a wide difference between the liberty of the press and the license of the press. The one should be guaranteed as fully as the other should be watched. Society would be in a truly pitiable state if an editor of a newspaper were allowed to assert that a man was a pirate, or a highway robber, without any provocation, and shield himself from responsibility by asserting that he was not actuated by malice. On the other hand, it would be a very bad state of affairs if the public journals of the country were deterred from reporting the fact that a warrant had issued for the arrest of a man charged by affidavit, before a competent court, with embezzlement and theft, and be made to pay a large sum of money because it happened to be said that if the charge was true he who committed it was a criminal.

While I do not think that a newspaper has any right to publish, broad cast, libels against unoffending citizens, I do not think that its editors should be forced to write with manacles upon their hands. I see nothing in the article which the editor had not the right to publish, or any comment thereon which is libelous, and I therefore dissent from the opinion of the court just pronounced.

Justice WYLY concurs in this opinion.

ON REHEARING.

TALIAFERRO, J. An examination of this case on rehearing does not induce us to think there should be any change in the judgment first rendered by us. It is therefore ordered that the original decree of this court remain unaltered.

No. 5661.

POLICE JURY OF THE PARISH OF POINTE COUPEE v. A. L. MAHOUDEAU et als.

If the description of the instruments sued on was materially defective, the plaintiffs should have been allowed, under the circumstances of the case, an opportunity to amend before their suit was dismissed. But although the petition is loosely constructed, the documents being made a part thereof supply a deficiency therein in relation to their nature and contents, and the only consequence of a failure to file them at the time of filing the petition, is that the defendant may refuse to answer until he has *oyer* of them.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Hewes, J. Farrar & Montgomery, Charles Parlange and L. B. Claiborne*, for plaintiffs and appellants. *A. L. Mahoudeau and C. E. Schmidt*, for defendants and appellees.

HOWELL, J. The plaintiffs have appealed from a judgment dismissing their suit for insufficiency of description of the instruments sued

on. If the description were materially defective, the plaintiffs should have been allowed, under the circumstances, an opportunity to amend before their suit was dismissed. But we are inclined to think that, although the petition is loosely constructed, the documents being made a part thereof supply any deficiency therein in relation to their nature and contents, and that "the only consequence of a failure to file them at the time of filing the petition is that the defendant may refuse to answer until he has *oyer* of them." 2 La. 133; C. P. 175.

The acts of mortgage and the notes on which the action is based are sufficiently described to fix their identity and purport, and being a part of the petition, they, with it, contain a full statement of the cause of action, including an accurate description of the property affected by the mortgage.

It is therefore ordered that the judgment herein be reversed and the cause remanded to be proceeded in according to law, the appellees to pay costs of appeal.

No. 5703.

STATE ex rel. O. PROVOSTY, District Attorney v. JUDGE OF THE SEVENTH JUDICIAL DISTRICT COURT.

Section 1067 of the Revised Statutes does not repeal article 338 of the Code of Practice in regard to the recusation of judges.

APPPLICATION for a writ of mandamus against T. H. Hewes, judge of the Seventh Judicial District, parish of West Feliciana. *O. Provosty*, District Attorney, relator, *in propria persona*. *Charles Parlange*, for respondent.

MORGAN, J. In the summer of 1872 several persons were arrested in the parish of West Feliciana, charged with the murder of one Haile. Thomas H. Hewes was employed by the accused as their attorney. In that capacity he appeared at their preliminary examination, which resulted in their being admitted to bail. Having furnished the required bond, they were released from custody.

At the March term of the district court indictments were found against them.

In the meanwhile Hewes was made judge of the district. He recused himself. The district attorney, on the part of the State, moves that he be ordered to proceed with the trial. He contends that as section 1067 of the Revised Statutes declares that "any judge may be recused or may recuse himself in criminal cases, if said judge be connected by blood or marriage with any person charged with any offense against

State ex rel. Provosty, District Attorney v. Judge of the Seventh Judicial District Court.

the laws of the State," and inasmuch as the judge is in no way related to the accused, he can not recuse himself.

The section in question does not, in our opinion, repeal the article 338 of the Code of Practice, the second paragraph of which says that the judge being related to one of the parties to the suit within the fourth degree, and the third paragraph of which declares that his having been employed or consulted as an advocate in the cause is a good ground for his recusation.

The section 1067 of the Revised Statutes simply changes the degree of relationship which gives rise to the right and duty of a judge recusing himself. In civil matters he may be recused when related to either party within the fourth degree. In criminal matters he may be recused or may recuse himself, if he be connected by blood or marriage with the accused in any degree.

Our brother was right to recuse himself. One can not be counsel and judge in the same case.

The rule is dismissed.

No. 5631.

CHRISTIAN BADEN v. J. B. REEVES, Executor, and SHERIFF.

The property for which exemption from seizure is claimed by plaintiff, under the homestead law, seems under the circumstances of the case to partake more of the character of rural than urban property. The humane provisions of the homestead law reserving to the unfortunate debtor a home, and soil to cultivate, must be interpreted in the same spirit in which they were framed.

APPPEAL from the Ninth Judicial District Court, parish of Rapides, *Orsborn, J. Daigre & Casabat*, for plaintiff and appellee. *R. A. Hunter*, for defendant and appellant.

TALIAFERRO, J. The plaintiff enjoined the sale of property seized under execution issued on a judgment obtained by the defendant against the plaintiff, on the ground that having no other property than that seized he is entitled to retain it as exempted by law from seizure under the homestead law. The defendant contested the right set up by the plaintiff, and the judgment of the lower court was in favor of the plaintiff, perpetuating the injunction. The defendant has appealed.

The property seized is a small parcel of ground containing about four arpents, situated on the outskirts of the town of Pineville, lying on the Red river, opposite to Alexandria, in Rapides parish.

It is shown that the plaintiff is a cooper by trade; that he resides upon this place with his family; that he has a cooper's shop there, but does not follow the business of coopering regularly; that he has a

Baden v. Reeves, Executor, and Sheriff.

garden, from the produce of which he has a surplus for market over and above the needs of his family; that he has peach trees and bee hives on the place, and raises upon it a little corn. This small establishment is the only property the plaintiff owns.

The evidence seems to establish that the means of sustenance of the plaintiff and his family, consisting of a wife and several children, is to a large extent derived from the products of his four arpents of land. We can hardly regard this property as belonging to the class called urban property, and we think under all the circumstances shown that it partakes more of the character of rural property. The humane provisions of the homestead law reserving to the unfortunate debtor a home, and soil to cultivate, may well apply to this case. The character of the property is different from that claimed as homestead in the case quoted by defendant's counsel, 25 An. p. 219. In that case a house and lot in the town of Jackson was sought to be exempted.

Judgment affirmed.

No. 5590.

STATE OF LOUISIANA *v.* CHAPMAN EPPS.

There can no judgment be passed, when there was no arraignment. The arraignment is the issue made, and when there is no issue, there can be no trial. This absolute requirement of the law is not cured by the fact that the accused was brought into court and tried without objection.

APPEAL from the Fourth Judicial District Court, parish of St. James. *Flagg, J.* Criminal case. *M. Marks*, District Attorney, for the State, appellee. *Winchester & Pugh*, for defendant and appellant.

MORGAN, J. The record in this case does not show that the defendant was arraigned.

The arraignment was necessary. It is then that the prisoner is called on to plead to the indictment; it is then that the issue between him and the State is made up. Without this there is no issue; without an issue there can be no judgment. This absolute requirement of the law is not cured by the fact that he is brought into court and is tried without objection. Without his having been arraigned, there was nothing to try.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be avoided, annulled, and reversed, and that the case be remanded to be proceeded with according to law.

Sarah S. Tilson v. Catherine Haine.

No. 5658.

SARAH S. TILSEN v. CATHERINE HAINE.

The only objection urged by plaintiff to the sale in this case is that the price was paid in Confederate money.

There are three grounds fatal to the objection :

First—The contract by which the defendant acquired the property in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868.

Second—The plaintiff, by receiving \$350 of the proceeds in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—The plaintiff can not keep the price or any part thereof, and claim the thing sold.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J. Cross & Pipkin*, for plaintiff and appellant. *Kernan & Lyons*, for defendant and appellee.

WYLY, J. C. P. Jarret died in 1862, leaving an estate consisting of a house and lot in the town of Clinton, and personal property, all held in community with his surviving wife. He left one minor child. W. D. Gayle qualified as administrator of the estate. On the eighth of February, 1864, she applied for an order of sale to effect a partition. On the same day a decree was signed, ordering the sale, fixing the terms as to her interest, and ordering a family meeting to fix the terms for the minor's interest. The family meeting assembled and advised the sale of the property for cash, provided it brought its appraisement; otherwise on terms of credit. The property was sold by virtue of this decree, and the defendant became the purchaser, for \$3500 cash, which she paid, and the administrator received, in Confederate money. In 1866, she gave her receipt to said administrator for \$350, the estimated value of the Confederate money. She has brought this suit in the alternative to recover the property or to compel compliance with the bid in currency.

The court rejected the demand, and plaintiff appeals.

The only objection urged to the sale is, the price was paid in Confederate currency.

There are three grounds fatal to plaintiff's pretensions in this case :

First—The contract by which the defendant acquired the property in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868, and the jurisprudence on this point is settled. See 23 An. 610, 614; 21 An. 514, 540.

Second—The plaintiff, by receiving \$350 of the proceeds, or that sum in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—She can not keep the price, or any part thereof, and claim the thing sold.

Judgment affirmed.

Perkins & Billiu v. Morgan.

No. 5578.

PERKINS & BILLIU v. CHARLES MORGAN.

The defendant objected to the jurisdiction of the court below on the ground that he was, as alleged in the petition, a citizen of the State of New York. A citizen of that State can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile, for the reason that, in so far as this State is concerned, he has no domicile.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.* Jury trial. *J. S. Billiu*, for plaintiffs and appellees. *Leovy & Monroe; Goode, Winder & J. S. Goode*, for defendant and appellant.

MORGAN, J. Defendant is sued as owner of what was once the New Orleans, Opelousas and Great Western Railroad, for the value of several mules, alleged to have been run over and killed or injured, and the cart to which they were attached destroyed, by the carelessness of one of his employes.

Service of the petition was accepted and citation acknowledged by Charles A. Whitney & Co. It is not disputed that Whitney & Co. are defendant's agents, or that they had authority to represent him.

Subsequently, he appeared by counsel and excepted to the jurisdiction of the court upon the ground that he was, as alleged in the petition, a citizen of the State of New York.

A citizen of the State of New York can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile, for the reason that, in so far as this State is concerned, he has no domicile. The exception was, we think, properly overruled.

The defendant's railroad runs through the plaintiffs' plantation. Crossing the track there is a plantation road, which is also used by the neighborhood. Near the crossing there is a warehouse. A cart drawn by three mules, belonging to the plaintiffs, was being driven along the road in question. The road runs through a cane-field, and, at the time of the accident, the cane was high.

We think the evidence establishes that the mules were on the track when the train was discovered by the driver of the cart. He tried to stop them, but failed. Frightened, he jumped from the cart. The mules turned a little to the left, and one of them was struck by the arm of the engine, and the team was thrown into a ditch. One of the mules was killed outright, one died soon after, and the third was so injured that, to end his sufferings, his life was taken.

No bell was rung, no whistle was blown, no signal was given by the

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train to notify persons who might be using the road that a locomotive was approaching.

On the other hand, it is in evidence that the mules were being driven up the road at a full trot. It is contended that the driver, if he had observed properly, could have seen the smoke-stack of the locomotive and heard the noise of the train. Probably, the furious gait at which he was driving made his cart so noisy that he could hear nothing but its rattling. Certain it is that he was warned of his danger by a young girl, who shouted to him as he drove by the house near the track, where she lived. If he heard, he did not heed her. Nothing could be more careless and reckless than the conduct of this driver, and the calamity which befell the plaintiffs is to be attributed to the want of prudence of their servant. Under these circumstances they can not recover.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

No. 5607.

C. K. DAVID v. THE PARISH OF EAST BATON ROUGE.

A judgment acquiesced in and partially executed can not be appealed from.

The plea that acquiescence in a judgment can not be given by a police jury so as to prohibit a parish from appealing from a judgment rendered against it, is not tenable. There is no reason why a parish should not be bound by the acts of its agent as an individual would be.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. A. S. Herron and G. W. Buckner*, for plaintiff and appellee. *G. A. Griffith*, parish attorney, and *B. T. Posey*, for defendant and appellant.

MORGAN, J. This suit is instituted by the holder of certain parish warrants, who asks judgment against the parish, and that a tax be assessed and collected to pay the same.

The action is instituted under the 2629th and 2630th sections of the Revised Statutes. The parish appeals from a judgment rendered in conformity with the prayer of the petition.

A motion is made to dismiss the appeal on the grounds:

First—That the judgment was rendered by consent.

Second—That it has been acquiesced in.

Passing over the question as to whether or not the judgment was a consent judgment, it was certainly acquiesced in.

The judgment was rendered on the sixth February, 1873. By the proceedings of the police jury, January 6, 1874, it appears that the

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payment of judgments against the parish was provided for by a tax to be laid. It is admitted that the present judgment was embraced in the action of the police jury, and that a portion of the tax thus levied was collected and paid thereon.

The present appeal was taken in December, 1874.

It is contended, however, that acquiescence can not be given by a police jury so as to prohibit a parish from appealing from a judgment rendered against it. It seems to us, however, that this position is not tenable. We see no reason why a parish should not be bound by the acts of its agent as an individual would be. A judgment acquiesced in and partially executed can not be appealed from.

The appeal is dismissed.

No. 5672.

STATE ex rel. MRS. CHARLES PECOT et als. v. PARISH JUDGE OF THE
PARISH OF ST. MARY.

Until the judgment appealed from be disposed of by this court, which has granted relators a suspensive appeal, the property of the succession being in the custody of the executor and under the control of the parish court, and no moneyed judgment having been rendered against said relators, who do not seek to suspend the execution of any such judgment, it follows, under this statement of facts, that a bond for costs is all that they should be held to give.

APPPLICATION for a writ of mandamus against E. B. Mentz, parish judge of the parish of St. Mary. *D. Caffery and F. L. Richardson*, for relators. *E. B. Mentz, in propria persona. Randolph, Singleton & Browne*, for respondent.

MORGAN, J. In a former proceeding we directed the defendant to grant to relators a suspensive appeal upon their giving bond according to law.

The property belonging to the succession is in the custody of the executor and under the control of the parish court. It is claimed by the relators. Judgment was rendered against them. From this judgment we have granted them a suspensive appeal. Until the judgment appealed from is disposed of by us, the property will remain where it is. No moneyed judgment has been rendered against the relators. They are not seeking to suspend the execution of any judgment given against them. The suspensive appeal which has been granted to them simply keeps the property in the hands of the executor. Under this state of facts, a bond for costs is all that they should be held to give.

It is therefore ordered, adjudged and decreed that the rule herein granted be made absolute, and that the parish judge of the parish of St. Mary be ordered to grant to the relators a suspensive appeal from the judgment by them complained of upon their furnishing bond in the sum of one hundred dollars.

No. 5651.

W. BODEIN KEENE v. GEORGE GUIER and SHERIFF.

The property of a cotutor is not subjected to the legal mortgage of the minor. But, by the term cotutor, must be understood the person who becomes so by the fulfillment of the requirements of law.

Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutroship *ipso facto*. In such a case, the children of a previous marriage have a legal mortgage on the property of the new husband for the acts of the tutroship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

APPEAL from Thirteenth Judicial District Court, parish of Carroll. *Hough, J. J. W. Montgomery and F. F. Montgomery*, for plaintiff and appellee. *Leonard & Kennedy*, for defendant and appellant.

TALIAFERRO, J. This is an injunction suit. The defendant, in injunction, George Guier, a judgment creditor of Horace B. Tibbetts for a large amount, caused a *fiery facias* to issue and seized a plantation, called "Hollybrook," which was advertised for sale by the sheriff. The plaintiff enjoined the sale of the property, alleging herself to be the owner of the plantation seized, and in possession thereof under good and lawful title.

The facts, as we learn them from the record, seem to be that the plaintiff and his brothers and sisters inherited a large estate in the parish of Carroll, from the succession of their father, J. Wallace Keene, who died in the year 1853; and, subsequently, as legatees under the will of their grandfather, W. B. Keene, who died in 1857, the petitioner and his coheirs received a large and valuable amount of property; that the petitioner and his coheirs were at that period minors and their mother was their duly appointed tutrix, who took control and management of their entire property; that their mother and tutrix, in the month of December, 1857, intermarried with Horace B. Tibbetts, without the calling of a family meeting to consider the propriety of the mother being retained in the tutroship and authorizing her to retain it after her second marriage; that the administration of the minors' property was carried on by Mrs. Tibbetts and husband after their marriage, and they executed a bond for the faithful discharge of their duties as tutrix and cotutor; that some eighteen months after their marriage they were duly appointed by legal authority tutrix and cotutor to the minors.

It appears further that in January, 1860, Horace B. Tibbetts bought the Hollybrook plantation; that on the tenth of October, 1866, George Guier recovered a judgment in his favor against the said Tibbetts for \$21,000, and caused it to be recorded on December 22 following.

In 1866 the undertutor to the minors filed a petition in the proper court, calling upon the tutrix and cotutor to file an account of the tutorship; an account was filed by them in 1868; opposition to this account was filed by the petitioner, Bodein Keene, R. Subman Keene and Mary Keene, who had then attained the age of majority.

Upon an examination of the account and hearing the oppositions the court rendered judgment, fixing a balance due the heirs by the tutrix and cotutor of \$150,000, and recognized a legal mortgage against the property of the tutrix, to date and take effect from the first of January, 1854, and against the property of the cotutor, to have effect from the first of January, 1858. This legal mortgage recognized by the judgment has been kept in force by duly recording it in conformity with law.

An execution was issued on the judgment so obtained, and the Hollybrook plantation, as the property of the tutrix and cotutor, containing eleven hundred acres, was seized and sold in February, 1870, and purchased by Bodein Keene, the plaintiff in this case, at the price of \$5514, and went into possession of it and so remained in undisturbed possession until April, 1873, when George Guier issued execution on his judgment, and caused the said plantation to be seized and advertised, and to restrain the sale of which the plaintiff obtained the injunction aforesaid.

On the trial of the case in the lower court, judgment was rendered perpetuating the injunction, and a judgment of nonsuit against the plaintiff on his claim for damages.

From this judgment the defendant, Guier, has appealed.

The principal question for solution is: Had the minors Keene a legal mortgage against the Hollybrook plantation, arising from their judgment against their tutrix and cotutor? It was determined by this court in the case of *Emily Hatcher v. Jackson*, 21 An. 737, that the property of a cotutor is not subjected to the legal mortgage of the minor. By the term cotutor, however, we understand the person who becomes so by the fulfillment of the requirements of law. Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutorship *ipso facto*. In such a case the children of a previous marriage have a legal mortgage on the property of the new husband, for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place. Civil Code, article 3316. The article preceding it, 3315, has the same force and bearing. There is a legal mortgage on the property of persons who,

without having been appointed tutors to minors or curators of interdicted or absent persons, interfere in the administration of their property, reckoning from the day in which the first act of interference was done.

Recurring to the facts of the case before us, we see that for about seventeen months succeeding the time of the marriage, embracing too, an important period of their administration of the minors' property, Mrs. Keene, the mother, and her "new husband," were unauthorized to exercise the functions of tutorship, and that it was unlawfully kept by the mother at least during that period, and, consequently, that the penalty prescribed by article 3316 of the Civil Code was incurred, viz : that of subjecting the property of the husband to the legal mortgage of the minors. But, in order to fix the amount of the liability incurred during the period the tutorship was illegally held by the mother, we must remand this case to the court *a qua* for that purpose. The record of the case presented to this court is extremely meager, and contains no data by which such liability may be ascertained by this court.

It is therefore ordered that the judgment of the lower court be annulled and that this case be remanded to the court of the first instance, to the end that the indebtedness and liability, if any, incurred by the mother to the minors during the time that intervened between the date of the marriage and that of the appointment of the mother and her husband to the offices of tutrix and cotutor be definitely ascertained and fixed.

No. 5708.

STATE ex rel. JOHN COLEMAN v. JUDGE OF THE SIXTH DISTRICT COURT,
PARISH OF ORLEANS.

The indorser of a note having obtained a suspensive appeal from a judgment against him as such, and having given as surety on the appeal bond the maker of the note, against whom a separate judgment was rendered in the same suit, and the parties having severed in their defense;

Held—That in cases previously decided, the sufficiency of such a surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

APPPLICATION for a writ of mandamus and prohibition against *Sau-cier*, Judge of the Sixth District Court, parish of Orleans. *J. D. Coleman*, for relator. Respondent in *propria persona*.

HOWELL, J. The relator obtained a suspensive appeal from a judgment against him as indorser of a note, and gave as surety on the appeal bond the maker of the note, against whom a separate judgment had been rendered in the same suit, the parties having severed in their defense. The plaintiff in the suit moved to set aside said appeal on

State ex rel. Coleman v. Judge of the Sixth District Court.

the ground that the surety was not good, and such as the law requires. This rule was made absolute, and the relator asks for writs of mandamus and prohibition against the district judge to secure the benefit of the suspensive appeal and prevent the issuance of an execution. The judge answers that, in his opinion, the appeal bond furnished by the appellant afforded to the appellee no additional protection against the judgment debtors, as the surety and principal in the appeal bond are both condemned to pay the same debt, although in different decrees, and the property of each is bound for said debt under the said judgments, and further, that he has grave doubts about the solvency of the surety, because there are three executions against him now in the hands of the sheriff unexecuted and unsatisfied.

We think the doctrine in *State ex rel. Wilson v. Judge of the Seventh District Court*, 22 An. 262, and *Greiner v. Pendergrast*, 2 R. 235, must control this case.

In those cases the sufficiency of such a surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

It is therefore ordered that the writ of prohibition herein be perpetuated.

No. 5630.

PETER BORELAND v. HENRY LECKIE. MISS M. M. A. CALHOUN,
Intervenor.

In this court the intervenor has filed an affidavit in which she charges that the person who represented her in the court below, had no authority to do so. This is a matter which this court can not discuss originally.

A PPEAL from the Ninth Judicial District Court, parish of Grant. *Osborn, J.* Jury trial. *W. O. McGinsy* and *A. Leme*, for plaintiff and appellee. *R. A. Hunter*, for Henry Leckie, defendant and appellant. *George W. Lane*, for M. M. A. Calhoun, intervenor and appellant.

MORGAN, J. Plaintiff confessed judgment in favor of defendant for \$4700. Execution issued thereon. The judgment was rendered in January 1874. Execution issued in February following.

Plaintiff has enjoined the sale of the property seized upon the ground that the judgment was obtained through fraud, misrepresentations and ill practices on the part of the defendant, through his attorney. He avers that he confessed judgment upon the condition that he was to have a stay of execution, and to be furnished with supplies sufficient to enable him to make a crop. He alleges further that no notice of seizure was served on the judgment debtor, as required by law.

M. M. A. Calhoun intervened and claimed the property seized. She also enjoined the sale thereof by the sheriff.

Judgment was given in favor of the plaintiff, with \$1000 damages, against the defendant. Calhoun's intervention was dismissed.

Defendant and intervenor appeal. Defendant prays that the injunction be dissolved with damages.

There was no stay of execution stipulated in the judgment, and the only evidence of any conditions having been attached thereto, is the testimony of the plaintiff. Even if such testimony would avail in such a case, the plaintiff is flatly contradicted by the defendant's witness. We must therefore take the judgment to be an unconditional one.

The claim of the intervenor is not substantiated by the evidence. In this court she has filed an affidavit in which she charges that the person who represented her in the court below, had no authority to do so. This is a matter which we can not discuss originally.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants dissolving the injunction, with costs in both courts.

No. 5591.

THE STATE OF LOUISIANA v. MATILDA BROWN, MARTHA BROWN
and CHAPMAN EPPS.

In this case no sentence having been pronounced, and no fine imposed in the court *a quo*, the plea to the jurisdiction of this court, founded on article 74 of the constitution, must prevail.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J.* Criminal case. *M. Marks*, District Attorney, for the State, appellant. *Nichols, Pugh & Winchester*, for Chapman Epps, defendant and appellee.

MORGAN, J. Chapman Epps was indicted, with Matilda and Martha Brown, for murder. On the trial they severed. Epps was tried, and a verdict of manslaughter was rendered against him. He applied for a new trial, which was granted, and a change of venue was ordered. The proceedings were transferred to the parish of Ascension. In Ascension he pleaded *autrefois acquit*. The plea was sustained.

The State appeals.

In this court the defendant urges that we are without jurisdiction to investigate the case. He says that under the seventy-fourth article of the constitution, no appeal will lie in criminal cases unless the punishment of death or imprisonment at hard labor, or a fine exceeding three

State v. Matilda Brown, Martha Brown and Epps.

hundred dollars is actually imposed. This is the language of the constitution.

In the case of the State v. Redding, 21 An. 188, it was held that this court has jurisdiction of criminal cases on questions of law only, whenever the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed.

In the case of the State v. Gay, 22 An. 460, the accused appealed from an order granting to the State a rehearing of a motion to discharge. He was never sentenced. We said: "No appeal lies to this court, in a criminal case, unless a sentence of a certain magnitude has been imposed." The appeal was dismissed.

In the case of the State v. Welsh and Fagan, 23 An. 142, the defendants were indicted for murder and found guilty of manslaughter. A motion for a new trial was made on their behalf, which was granted. From the order granting the new trial and continuing the case the State appealed. The appeal was dismissed upon the ground, no appeal lies to this court in criminal cases except when a sentence of a certain severity has been actually imposed.

In the case now before us no sentence was pronounced, and no fine was imposed. Under the authorities quoted the plea to our jurisdiction must prevail.

Appeal dismissed.

No. 3440.

JOHN ANDERSON v. J. I. ARNETTE AND WHELESS & PRATT.

Where the court, opening at ten o'clock, the defendant's counsel came into court at twenty minutes past ten and found his case had been submitted, the judge *quo* did not err in refusing to reinstate it. The testimony shows that the case was not taken up out of its regular order, and defendant's counsel gave no good reason why he was not present. If he chose to take the risk of his case not being reached during his absence, he must take the result of his risk.

During the existence of a commercial partnership, service on one of the members is good against all, but, after its dissolution, any member intended to be sued, must be served with a separate citation.

The supplemental answer of Wheless, in which he claims, in reconvention, judgment against Anderson for an amount alleged by him to be due to the firm of Wheless & Pratt, of which firm he asserts himself to be the liquidating partner, does not authorize a judgment on Anderson's original demand against Pratt, who was not cited.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Budd & Grover*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendants and appellants.

MORGAN, J. This case had been several times continued in the lower court. After being partially tried it was continued to a certain day.

Under the law as it then stood, cases in that condition were placed at the foot of the trial list of the cases regularly fixed for that day. The court opens at ten o'clock. At twenty minutes past ten defendants' counsel came into court, and found that his case had been submitted. The testimony shows that the case was not taken up out of its regular order.

Defendants moved to reinstate the case, but the judge refused to do so, and we can not say that he erred, as the counsel who represented the defendants gave no good reason why he was not present. He knew that the court met at ten o'clock in the morning. He does not show any cause which prevented him from being present when the court was opened. If he chose to take the risk of his case not being reached during his absence, he must take the result of his risk.

It is claimed that the judgment against Pratt is null and void because no service was made upon him. Wheless & Pratt had been commercial partners. The partnership had been dissolved. Wheless was the liquidator thereof. He alone was cited. Pratt could not be found. Wheless answered. Subsequently, he filed a supplemental answer, and, as liquidating partner of Wheless & Pratt, reconvened against Anderson, the plaintiff, alleging an indebtedness by him to the firm of Wheless & Pratt.

We are to determine whether the service on Wheless was, in law, a service on Pratt, and, if not, whether the supplemental answer of Wheless, in which he alleges that he is the liquidating partner of Wheless & Pratt, brings him into court.

We think not. During the existence of a commercial partnership, service on one of the members is good against all; but after its dissolution every member intended to be sued, must be served with a separate citation. *C. P. 198; Gaiennie v. Akin*, 17 La. 42; *Kearney v. Fenner*, 14 An. 870.

The supplemental answer of Wheless, in which he claims judgment against Anderson for an amount alleged by him to be due to the firm of Wheless & Pratt, of which firm he asserts himself to be the liquidating partner, does not authorize a judgment on Anderson's original demand against him.

It is therefore ordered, adjudged and decreed that the judgment of the district court, as regards the defendant Pratt, be avoided, annulled and reversed, and that as against the defendant Wheless, it be affirmed, the costs as regards Pratt to be borne by the appellee; those against Wheless to be paid by him.

No. 5660.

**D. R. CARROLL & CO. v. H. T. BRIDEWELL. MRS. LIZZIE HAMILTON,
Intervenor.**

The intervention is dismissed. The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

If the intervenor had a lessor's privilege, it should have been asserted before the sequestered property was released on bond. No fraud and collusion are shown between the plaintiffs and the defendant.

The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. James T. Coleman*, for plaintiff and appellee. *H. R. Morrisson*, curator *ad hoc*, for defendant and appellee. *E. D. & W. Farrar, E. H. Farrar*, for intervenor and appellant.

WYLY, J. Plaintiffs sued the defendant on his three promissory notes, amounting in the aggregate to \$4073 47, and claiming a vendor's privilege on the mules, and a furnisher of supplies' lien on the crops raised on the Connor plantation during the year 1873, sequestered eight mules and eighty-eight bales of cotton.

On the twenty-third December, 1873, soon after the seizure, the defendant procured a release on bond of said property, Mrs. Lizzie Hamilton, the owner of said plantation, being one of the sureties on said bond. Subsequently, to wit: on May 12, 1874, Mrs. Hamilton filed a petition of intervention, alleging that she was the lessor of the Connor place; that the property sequestered was the crops grown on said plantation, and the movables thereon situated; that she had a lien on those crops as lessor superior to that of the plaintiffs' lien for supplies; that she was surety on the release bond; that the writ of sequestration had illegally issued, for the reasons assigned in a motion to dissolve the same therewith presented and filed, to wit: for the reasons that the writ had issued without any affidavit, and that the order had been made by an incompetent judge; that she had been induced to become surety for the defendant by representations made to her by him to the effect that he did not owe the debt sued on; that a suit had previously been brought against him in the State of Mississippi by the same parties on the same cause of action; that the writ of sequestration had been illegally obtained, and that, if she would go on his bond, he would ship her cotton to pay her lease; that, owing to his noncompliance with this agreement, and owing to a writ of provisional seizure obtained by her to secure her rights, the defendant had threatened to revenge himself upon her by allowing judgment to go by default against him in this suit, in order that he, being insolvent, she might be held liable on the release bond; that he had written a threatening letter to her to

that effect; that he had also written a letter to his counsel, dismissing him from his employment, and withdrawing all defense in this suit; that she had reason to believe, and did believe, that the defendant had willfully, corruptly and maliciously corresponded with the plaintiffs or their representatives, agreeing to confess judgment, or permit the same to be taken by default, with a recognition of the validity and legality of the writ of sequestration, so as thereby to hold her liable on the release bond, and to force her to pay his debts, and in that manner to secure his revenge.

The relief she prayed for was, that her privilege as lessor be recognized as superior to that of plaintiffs; that she be allowed to file a motion to dissolve the sequestration on the grounds above mentioned, and that the court act on said motion, and dissolve the sequestration.

On second June, 1874, the intervenor filed a supplemental petition alleging that the plaintiffs and the defendant had conspired to perpetrate a fraud upon her; that in order to escape a criminal prosecution in the State of Mississippi, threatened to be instituted against him there by plaintiffs, the defendant had consented to let this case in Louisiana go by default, for the purpose of holding her liable on the illegal release bond; that in execution of that agreement the counsel for plaintiffs had drawn up the answer which was copied by Bridewell, and filed by the counsel; that she has a direct interest in the suit as far as the sequestration was concerned, for the reasons above given.

To this intervention the plaintiffs excepted:

First—That the intervenor can not urge irregularities in the suit between the original parties, such as the insufficiency of the bond and oath on which the sequestration issued, nor can she plead any exception to dismiss the action.

Second—The intervenor can not, without the consent of plaintiffs, substitute herself in the place of defendant.

Third—The intervenor shows no sufficient cause for the intervention.

The exception was referred to the merits, and the plaintiffs answered the intervention. At the trial the court gave judgment for the plaintiffs and dismissed the intervention with costs. The intervenor alone has appealed.

There are several reasons why the judgment under review should remain undisturbed:

First—The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

Second—If the intervenor had a lessor's privilege, it should have been asserted before the property was released on bond.

Third—No fraud and collusion are shown between the plaintiffs and the defendant.

Carroll & Co. v. Bridewell.

Fourth—The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued. See 21 An. 118, and authorities there cited.

Judgment affirmed.

Rehearing refused.

MORGAN, J., *dissenting*. The intervenor was the lessor of the plantation. Upon the crop made thereon and the movables used in growing it, she had a privilege superior to the plaintiffs, who furnished the supplies. It is true that the property seized by the plaintiffs was bonded, and that the intervenor went on the bond. Still the bond represents the property, and upon the property her lien and privilege, superior to the plaintiffs', is, I think, incontestible. I am, therefore, of opinion that the district judge erred in dismissing the intervention. I therefore dissent from the opinion just pronounced.

No. 5683.

AMBROSE et al. v. MADISON MARSH.

Where the property of the succession was offered for sale for cash, and, no one bidding, it was immediately offered on the terms of credit designated in the order, and was adjudicated to the administrator thereof, who directed the sheriff to adjudicate it to one Mrs. Simmons, a person having no real intention of purchasing, but receiving the adjudication only as an act of friendship to the administrator;

Held—That the succession never was divested of the property.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J.* Jury case. *H. A. Cross & Pipkin*, for plaintiffs and appellees. *O. McVea* and *D. J. Wedge*, for defendant and appellant.

MORGAN, J. Defendant was the administrator of the estate of Mrs. Priscilla Ambrose. Her estate consisted of a certain piece of land situate in the parish of East Feliciana, which was appraised at \$1000.

Plaintiffs are heirs of Mrs. Ambrose, and were minors when the succession of their parent was opened.

Defendant was the husband of one of the coheirs.

The administrator applied for the sale of the property belonging to the estate for the purpose of paying the debts. The order was that the property "be sold for cash, provided it brings its appraisement; and if not, that it be reoffered for sale on a credit of twelve months."

The property was offered for sale for cash, and, no one bidding, it was immediately offered on the terms of credit designated in the order. According to the return of the sheriff "it was adjudicated to Madison Marsh, but by order of the said Marsh, it was adjudicated to Mrs. S. J. Simmons for the price of \$500."

 Ambrose et al. v. Marsh.

The heirs—at least these plaintiffs—now accepting the succession of their mother claim to be put in possession of the property left by her, alleging that the title thereto has never been legally divested from them; that the sale thereof was made without the observance of the formalities required by law; that the real purchaser thereof was Marsh, the administrator, and that Mrs. Simmons was a party interposed, who had no real intention of purchasing the property, but received the adjudication only as an act of friendship to Marsh.

Either of the positions assumed by plaintiffs is sufficient to strike the proceedings complained of with nullity, and they are both supported by the evidence.

The law provides that when property is offered for sale for cash, and does not bring the amount required by the statute, it shall be re-offered after a publication of fifteen days.

It is even, if possible, more explicit that administrators of estates shall not purchase property belonging to the estates which they administer, except in certain specified cases. The evidence satisfies us that Mrs. Simmons was a mere party interposed, and that in reality Marsh was the real purchaser. Under these circumstances the jury were right in decreeing that the property in question belonged to the succession of Mrs. Ambrose.

Judgment affirmed.

 No. 5580.

CHARLES E. ALTER v. S. O. NELSON & Co.

This suit was brought to revive a judgment *in solido* against defendants, Nelson & Co., serving citation only on Nelson. In bar of the proceeding he pleaded his discharge in bankruptcy. It was a vain thing to cite him, because he could not be held personally liable, and whether or not a judicial mortgage should be perpetuated against the bankrupt's estate by reviving the judgment, was a question that might interest the assignee, the special representative of the ordinary creditors, but it in no manner concerned the bankrupt, who had surrendered his entire estate.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Frank L. Richardson*, for plaintiff and appellant. *Breaux, Fenner & Hall, Hyams & Jonas*, for defendant and appellee.

WYLY, J. On the sixteenth June, 1863, the plaintiff recovered judgment against the defendants *in solido* for \$25,000. On tenth of June, 1873, he brought this suit to revive said judgment, serving citation only on S. O. Nelson.

In bar of the proceeding the defendant, S. O. Nelson, pleaded his discharge in bankruptcy. The court gave judgment for this defendant, and the plaintiff appeals.

Alter v. Nelson & Co.

We think the court did not err. The discharge in bankruptcy released the defendant from paying the judgment. And if the object of the plaintiff was, as he says, merely to avert prescription of the judgment in order to preserve the judicial mortgage resulting from recording the judgment in the parish of Iberia, where the defendants owned immovable property, that object could not be accomplished by citing the defendant, a discharged bankrupt, who was without interest.

It was a vain thing to cite him, because he could not be held personally liable; and whether or not a judicial mortgage should be perpetuated against the bankrupt's estate by reviving the judgment was a question that might interest the assignee, the special representative of the ordinary creditors, but it in no manner concerned the bankrupt, who had surrendered his entire estate.

Judgment affirmed.

Rehearing refused.

No. 5567.

BANK OF AMERICA v. SEPTIME FORTIER. Third opposition of E. J. GAY & CO. Third opposition of CITIZENS' BANK.

Appellant gave no bond under the order for a suspensive appeal, but gave bond after getting an order for a devolutive one. This was not an abandonment of an appeal. There is no appeal until the bond is given, it matters not how many orders of appeal have been granted.

As the sheriff is a mere depositary, in this case, of the funds sought to be distributed, he has no interest in the controversy, and need not be made a party to this appeal.

The furnishers of supplies or cash actually used for the cultivation of a plantation have a privilege on the crops of that year, and it can not be divested by any prior mortgage, whether legal, conventional, or judicial, or by any seizure and sale of the land while such crops are on it, and such privilege bears on the growing crop.

As against the Citizens' Bank holding a conventional mortgage recorded in January, 1868, E. J. Gay & Co. have no preference for the supplies they furnished the defendant from January till April 23, 1873, because their claim was not recorded on the day the contract was entered into. Privileges are *stricti juris*, and persons desiring to affect third parties therewith must register them in the manner required by law.

Construing articles 3273 and 3274 Revised Code, so as to give effect to both, the conclusion is that privileges have effect as to third persons generally from the date of their registry; but, for a privilege to have a preference over an existing mortgage, it must be recorded on the day the contract out of which it arises was entered into.

APPEAL from the Fourth Judicial District Court, parish of St. James. *Flagg, J. Johnson & Denis*, for plaintiff and appellee. *Barrow & Pope*, for E. J. Gay & Co., third opponents and appellees. *A. Pitot, Legendre & Poché*, for the Citizens' Bank, third opponent and appellant.

WYLY, J. This is a controversy between Edward J. Gay & Co., privilege creditors for \$1847 43, and the Citizens' Bank, a conventional mortgage creditor for \$6000, for the balance of the proceeds remaining

after the payment of plaintiff's mortgage, under which the Felicité plantation, belonging to the defendant, was sold on the seventh of June, 1873.

Plaintiff bought the mortgaged property for \$20,500, and after satisfying its own judgment, costs and taxes, there remained \$2339 69, which plaintiff retained to pay the proportion of taxes on said property for 1873 up to the time of the adjudication, and to be applied to such privilege and mortgage creditors as might be entitled to it.

It is conceded that plaintiff is entitled to apply \$284 90 of the fund on hand to the payment of the taxes for 1873, leaving \$2054 79 as the sum in controversy between Edward J. Gay & Co. and the Citizens' Bank.

The court below decided that Edward J. Gay & Co. are entitled to a preference over the Citizens' Bank in the distribution of this fund, and the Citizens' Bank has appealed.

Edward J. Gay & Co. moved to dismiss the appeal :

First—Because appellant abandoned its suspensive appeal and, therefore, had no right to take this devolutive appeal.

Second—Because the sheriff has not been cited.

Third—Because the certificate of the clerk to the transcript is not sufficient.

Appellant gave no bond under the order for a suspensive appeal, but gave bond after getting an order for a devolutive appeal. This was not an abandonment of an appeal. There is no appeal until the bond is given, it matters not how many orders of appeal have been granted. 20 An. 236.

As the sheriff is a mere depository of the funds sought to be distributed, he has no interest in the controversy, and need not be made a party to this appeal. 20 An. 283; 1 An. 205; 2 An. 232; 5 An. 668; 11 An. 486.

The defect in the clerk's certificate to the transcript has been corrected under a writ of *certiorari* issued by this court.

The motion is therefore denied.

ON THE MERITS.

Edward J. Gay & Co. claim a privilege as furnishers of supplies and cash for the crop of 1873, standing at the time of the sale, June 7, 1873.

The Citizens' Bank is a conventional mortgage creditor, next in rank to plaintiff, and its mortgage was recorded on January 27, 1868.

The Citizens' Bank opposes the privilege claim set up by Edward J. Gay & Co. on the following grounds :

First—The crop of 1873 on the Felicité plantation, at the time of the sale, was a standing crop, an immovable and part of the land, Revised Code 465, and, therefore, it was subject to the bank's mortgage.

Second—Edward J. Gay & Co.'s privilege having been recorded on the second of June, 1873, and resting on an open account, dated April 23, 1873, was recorded too late to affect the Citizens' Bank mortgage over the crop as part of the immovable—the plantation.

Third—The inscription of said privilege was defective in not containing a description of the property affected thereby.

By article 3217 Revised Code the furnishers of supplies or cash actually used for the cultivation of a plantation have a privilege on the crops of that year, and it shall not be divested by any prior mortgage, whether legal, conventional, or judicial, or by any seizure and sale of the land while such crops are on it and such privilege bears on the growing crops.

Article 123 of the constitution provides, among other things, that "no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated;" and "the General Assembly shall provide by law for the registration of all mortgages and privileges."

In the Revised Code, under the title "How privileges are preserved and recorded," we find the following articles:

3273—"Privileges are valid against third persons from the date of recording of the act or evidence of indebtedness as provided by law."

3274—"No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day the contract was entered into."

As against the Citizens' Bank holding a conventional mortgage recorded in January, 1868, Edward J. Gay & Co. have no preference for the supplies they furnished the defendant from January till April 23, 1873, because their claim was not recorded on "the day the contract was entered into." They failed to comply with the requirement of article 3274, and, therefore, are not entitled to the preference it accords. Privileges are *stricti juris*, and persons desiring to affect third parties therewith must register them in the manner required by law.

The counsel of Edward J. Gay & Co. insists that, as under article 3273, privileges have effect as to third persons from the date of registry, that article should govern this case; if otherwise, great inconvenience will result, and parties will be forced to go to the place where the property is situated to contract, so the act may be recorded on the same day.

Construing articles 3273 and 3274 so as to give effect to both, we conclude that privileges have effect as to third persons generally from

the date of their registry; but for a privilege to have a preference over an existing mortgage it must be recorded on the day the contract out of which it arises was entered into.

As against ordinary creditors, Edward J. Gay & Co. acquired a preference under article 3273 from the day of the registry of their claim.

To oust prior mortgage creditors or to acquire a preference over them, these privilege creditors, however inconvenient, should have recorded their privilege on the day the contract was made, or the day it was acquired, because this was required in the unambiguous language of article 3274.

And this was the view of the law taken by this court in the cases of *Foley v. Hagan*, 23 An. 286, and *Marmillon v. Archinard*, 24 An. 610. See also 23 An. 271, 694; 25 An. 232; 26 An. 80. See also *Dunning v. Coleman*, lately decided.

In regard to the inconvenience that may arise from this interpretation of the law the court is not responsible, since it can only decide what the law is, not what it should be.

Our conclusion is that the Citizens' Bank has a preference over Edward J. Gay & Co. on the funds in controversy.

It is therefore ordered that the judgment herein be amended so as to reject the demand of the opponents, Edward J. Gay & Co., with costs, and to require the funds remaining, after the settlement of plaintiff's execution, costs and all taxes, as fixed in the decree herein, to be paid over to the Citizens' Bank, in part payment of its mortgage and as amended that the judgment be affirmed, Edward J. Gay & Co., paying costs of this appeal.

Rehearing refused.

No. 5555.

STATE OF LOUISIANA v. H. H. WILLERS.

Defamation by libel is the offense charged. Sections 804 and 1051 R. S., take this case out of the strict rules of the common law, and the purport only of the libelous letter as given in the information is sufficient. It was not essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation. The law of evidence upon this subject is complied with, if the matter or purport of the instrument offered conform to the purport and description thereof in the information. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

A PPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J.* Criminal case. *M. Marks*, district attorney, for plaintiff and appellee. *B. N. & Wm. Sims, Nichols & Pugh*, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment upon an information for libel, sentencing him to pay a fine of three hundred

and fifty dollars, and in default of payment to be confined in the parish jail for six months.

The information charges that the defendant "did maliciously defame one Pauline Rose, * * * by writing a certain letter containing libelous words, to wit: that she had, on the evening of the sixth of October, 1872, * * * committed adultery * * * with a man designated and styled by said Willers as an engineer; that the said Willers sent said letter, containing said libel, to said C. W. Rose, the husband of the said Pauline Rose, with the malicious intention of defaming the character of the said Pauline Rose, contrary to the form of the statute," etc.

To prove the libel, the district attorney offered in evidence a letter written in the German language, and purporting to be signed by the defendant, and to which objection was made on the grounds:

First—That the alleged libelous letter and matters charged in the information are set forth therein in the English language, and the information does not contain an allegation of any letter or matters written in German by the defendant.

Second—That no evidence is admissible of a libelous letter or matters written in a foreign language, unless the alleged libelous letter or matters be specifically set forth in the information in such language in *læc verba*, and that a letter written in German is inadmissible to prove an alleged libelous matter set forth, as in this case, in the English language.

Third—That there is a radical variance between the evidence offered and the allegations of the information.

The defendant also excepted to an interpreter offered to translate the German letter for the jury, on virtually the same grounds.

The judge did not err. The variance between the material allegations and the proof is not such as to require the exclusion of the evidence offered. Defamation by libel is the offense charged. The law is: "Whoever shall maliciously defame any person by making, writing, publishing, or causing to be published any manner of libel, shall, on conviction thereof, suffer fine or imprisonment, or both, at the discretion of the court." R. S., sec. 804; and section 1051 provides that "In all other cases (not mentioned in the preceding sections) whenever it shall be necessary to make any averments in an indictment as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* of the whole or any part thereof."

These statutes take this case out of the strict rules of the common

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law, and the purport only of the libelous letter is given in the information. We do not think it was essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation.

The law of evidence upon this subject is complied with if the matter or purport of the instrument offered conform to the purport and description thereof in the information, as was the case here.

The evidence was properly admitted.

The defendant filed a motion in arrest of judgment based on the same matters; and the same reasons, as above stated, justify the district judge in overruling it. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

Judgment affirmed.

Rehearing refused.

No. 5615.

ISAAC F. RILEY *v.* HEIRS OF E. M. RILEY.

Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

There is no force in the objection that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and that the judgment against them is null, inasmuch as they were not in legal contemplation in court, and could not stand in judgment. The petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This is sufficient, and fulfills the requirements of the law.

APPEAL from the Fifth Judicial District Court, for the parish of East Baton Rouge. *Dewing, J.* Jury trial. *W. F. Kernan and Lyons*, for plaintiff and appellee. *D. C. Hardee, Cross & Pipkins, Rice & Whitaker*, for defendants and appellants.

TALIAFERRO, J. There is a motion to dismiss this appeal on the ground that each defendant is surety for the other on their appeal bonds, and it is contended that this is inadmissible under the decisions of this court in the case in 12 L. R. 383, and in that in 18 An. 659. We think these cases are not in point. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes

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bound as surety for the other's debt. The authorities cited refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety.

The motion to dismiss is overruled.

On the merits of the case it appears that the plaintiff sues the heirs of Mrs. E. M. Riley, deceased, for services rendered her as general manager and overseer of her plantation for several years at \$400 per annum. The answer is a general denial and the prescription of three years. The plaintiff had judgment for \$580 against each of the defendants, and they have appealed.

The plaintiff, we think, has made out his case, which was tried before a jury, who rendered their verdict for \$580, the remainder of the plaintiff's claim being prescribed. On the part of the defendants it is urged that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and the judgment rendered against them null, as they were not, in legal contemplation, in court, and could not stand in judgment. We think the objection without weight. The facts seem to be that the petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This, we think, is sufficient, and fulfills the requirements of the law.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

HOWELL, J., recused in this case.

No. 5553.

EDWARD J. GAY & CO. v. MRS. SOLIDELLE DEYNODT et al.

This is a suit on two promissory notes with mortgage, drawn by defendant, and given as collateral security for advances made in plantation supplies. There is no evidence of fraud or bad faith on the part of the plaintiffs in regard to the possession of said notes, which were negotiable and were transferred by delivery. Gay & Co., it is true, had limited the amount of these advances to \$10,000. But the defendant exceeded this limit, and pretends not to be responsible for said excess. She can not be permitted to take advantage of this act of her own, and Gay & Co. have the right to cause the property mortgaged to be sold so as to satisfy the amount due them for advances made to the defendants.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. Barrow & Pope*, for plaintiffs and appellants. *Alfred Grima*, for defendants and appellees.

MORGAN, J. On the sixth February, 1871, Mrs. Deynoodt, duly authorized and empowered by her husband, executed her two promissory notes, each for the sum of \$6000, payable one year after date.

The notes were payable to her own order and were by her indorsed.

Their payment was secured by a mortgage upon her Armant plantation, situate in the parish of St. Charles.

On the twenty-seventh of February, 1871, these notes were pledged to E. J. Gay & Co. by Theo. Guyol, as collateral security for the payment of all advances to be made by Gay & Co. to Mrs. Deynoodt, to enable her to cultivate her plantation, to the amount of \$10,000, with interest, commissions, costs and charges thereon for that year (1871.)

On the twenty-seventh February, 1871, Gay & Co. entered into an agreement with Mrs. Deynoodt, who was authorized by her husband, to advance her money to carry on her plantation for that year, the aggregate amount never to exceed, at any one time, the sum of \$10,000.

The advances made by Gay & Co. to Mrs. Deynoodt for the year 1871 amounted to \$16,884 67. The proceeds of her crop left a deficit of \$7670 15.

Gay & Co. continued, under an authorized contract, to do Mrs. Deynoodt's plantation business for the year 1872.

Mrs. Deynoodt was authorized to borrow from Gay & Co. \$17,921 74, for advances made and to be made to her, to secure which she granted a privilege upon the crop which she was to make.

The result of this year's enterprise, added to the former, still show a balance due Gay & Co. \$6411 44.

Gay & Co. applied for and obtained an order of seizure and sale upon the notes of Mrs. Deynoodt, above described. She enjoined the sale of the property mortgaged to secure their payment upon the grounds that Gay & Co. are not the owners of the notes; that they gave no consideration therefor; that they were obtained by unlawful means; that Guyol owns them, and that she has a good defense against him; that Gay & Co. received the notes from Guyol as collateral security for the payment of certain advances which were to be made by Gay & Co. to herself, and fixed the sum at \$10,000; that this amount has been entirely paid; that the notes were obtained from her by unlawful means.

Gay & Co. excepted to the petition on the ground that it discloses no cause of action; they also moved that the defendant be made to prove the truth of the allegations contained in her petition of opposition and injunction. The exception and motion were tried together. The district judge decided in favor of the defendant. Plaintiffs appeal.

If the facts are as stated in the petition the cause of action is apparent. It remains to be seen whether the judgment is correct. There is no evidence of fraud or bad faith on the part of Gay & Co. in regard to their possession of the notes. They were in the hands of Guyol; they were negotiable, and were transferable by delivery. Guyol gave them in pledge to the plaintiffs, who, in consideration thereof, were to make advances to the defendant. Gay & Co. restricted the amount of these

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advances to \$10,000; but the defendant exceeded this limit. We do not think she can take advantage of this act of her own, and we think that Gay & Co. have the right to cause the property mortgaged to be sold so as to satisfy the amount due them for advances made to the defendant. This amount is \$6411 44.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the plaintiffs, and that the property mortgaged and described in the petition be sold, and that out of the proceeds of the sale thereof the plaintiff be paid the sum of six thousand four hundred and eleven dollars and forty-four cents.

No. 5678.

CHARLES E. ALTER v. JAMES McCULLEN.

Proceedings were taken in the Sixth District Court of New Orleans to revive the judgment obtained by the plaintiff against one Richard Nugent, and on which he rests his claim in this suit. Citation was made on Nugent, then an adjudged bankrupt, discharged from all liability on the judgment, and having no interest whatever in the matter. The citation was, therefore, null and void, and the judgment which followed void also. The plea of prescription against plaintiff must prevail.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J. Frank L. Richardson and James O. Fuqua* for plaintiff and appellant. *A. S. Herron and Favrot & Lamon* for defendant and appellee.

TALIAFERRO, J. This is an hypothecary action against the defendant as third possessor of property formerly owned by Richard Nugent and surrendered by him in bankruptcy, and sold by his assignee to James H. McKee, and by him to the present defendant.

The defendant filed a peremptory exception to plaintiff's action and answered, calling his vendor in warranty. McKee filed an answer and peremptory exception, and called E. E. Norton, assignee, in warranty. The latter made no appearance.

The defendant pleads the prescription of ten years against both the judgment and mortgage by which the plaintiff seeks to enforce his hypothecary claim against the property described in his petition. There was judgment in favor of the defendant, and plaintiff appeals.

It appears that the plaintiff obtained a judgment against Richard Nugent et al. on the twenty-ninth of May, 1863. Richard Nugent was adjudged bankrupt on the twenty-second of December, 1868, and discharged from all debts and claims provable against his estate, and which existed on the twenty-ninth of February, 1868, when his petition was filed.

In May, 1873, proceedings were taken in the Sixth District Court of

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New Orleans to revive the judgment obtained by the plaintiff against Richard Nugent, and resulted in a decree in the plaintiff's favor on the twenty-fourth of June, 1873.

In the proceedings in the Sixth District Court to revive the judgment citation was made on Richard Nugent, then an adjudged bankrupt, and discharged from all liability on the judgment and having no interest whatever in the matter. Citation was, therefore, null, and the nullity of the judgment rendered upon it followed.

This case is similar to that of *Kennedy v. Rust*, 25 An. 554, in which a curator *ad hoc* was appointed to represent Rust, an absentee and discharged bankrupt, like Nugent. This court held the citation null, and that the judgment rendered was of no effect. See also case of *Brigham v. Norsnothy*, 25 An. 600. The plea of prescription in the case now under consideration was well taken and must prevail.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 5543.

LAPENE & FERRE v. A. J. DELAPORTE, Administrator, et al.

Boudreaux purchased from Delaporte a certain piece of property, giving notes to the order of the vendor and secured by mortgage on the property sold. Afterward, Boudreaux sold to Villiers, who, as a part of the price, assumed to pay said notes, one of which in suit herein was then held by plaintiffs. The property thus purchased by Villiers was sold at the suit of the creditors of Boudreaux before the institution of this suit. Under these circumstances, Villiers should not be held to pay the assumpsit, there being a failure of consideration.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.* Jury trial. *E. D. Burgieres, Charles W. Du Roy, E. W. Blake*, for plaintiffs and appellants. *Bush & Goode*, for defendants and appellees.

HOWELL, J. In April, 1867, the plaintiffs instituted this suit against the administrator of J. B. Boudreaux, on a note secured by mortgage, and against E. M. Villiers, on his assumpsit, in an act of sale of the property affected by said mortgage from Boudreaux to Villiers, and dated June 9, 1866, in which act Villiers promised to pay said note as a part of the price. Villiers set up a special defense that the assumpsit was personal to Boudreaux; that the said property was incumbered with several conventional and judicial mortgages against Boudreaux and his vendor, under which it was sold, and he, Villiers, thereby evicted and released from his assumpsit. Judgment was rendered against the succession of Boudreaux and in favor of Villiers.

The plaintiffs appealed from the latter.

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The evidence, not objected to, shows that Boudreaux purchased from Delaporte, giving these notes to the order of the vendor and secured by mortgage on the property sold. Afterward, Boudreaux sold to Villiers, who, as a part of the price, assumed to pay said notes, one of which in suit herein was then held by these plaintiffs. The property thus purchased by Villiers was sold at the suit of the creditors of Boudreaux before the institution of this suit.

Under these circumstances Villiers should not be held to pay the *assumpsit*, there being a failure of consideration. The case of *Arnous v. Davern*, 18 La. 45, relied on by the plaintiffs, was modified, if not overruled, by that of the *Union Bank v. Bowman*, 9 An. 195, where the doctrine as here announced was maintained. The case in 17 An. 255 only recognizes the right of the third person against the *property*, in relation to which the stipulation in his favor was made, and is in harmony to that extent with the 9 An. case, and not in conflict with our view on the personal liability of the purchaser who makes the stipulation.

Judgment affirmed.

Rehearing refused.

No. 5551.

OLIVA THERIOT v. G. LYONS, Sheriff, et al.

The question in this case is whether an act of sale was simulated. The judge *a quo* held it to be a simulation, because the plaintiff in injunction moved to strike out interrogatories on facts and articles propounded to him, on the ground that they tended to make him confess himself guilty of a crime in seeking to make him contradict his affidavit annexed to his petition for injunction, which motion was withdrawn by permission of the court. The fact of filing such an injunction can not be considered as producing the effect given to it by the court below. It is not an admission of simulation, but must be presumed to be the interpretation which plaintiff's counsel gave of the tendency of such interrogatories. When put on the stand to answer said interrogatories, the plaintiff asserted the reality and good faith of his purchase, his ability to pay the price, and the actual payment thereof. The testimony in favor of the reality of the sale is not overcome.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J. Goode & Winder, J. D. Moore, Lacey & Butler*, for defendants and appellees. *Charles W. DuBois*, for plaintiff and appellant.

HOWELL, J. Plaintiff, as owner, enjoined the sale of two lots of ground, and the improvements thereon, in the town of Houma, seized under execution in the suit of *E. Marqueze & Co. v. B. F. Bazet*. The defendants in injunction aver that the sale from Bazet to Theriot is a simulation. On the trial, evidence was introduced to show the reality of the sale; but the judge *a quo* held it to be a simulation because the plaintiff moved to strike out interrogatories on facts and articles propounded to him, on the ground that they tended to make him confess

himself guilty of a crime in seeking to make him contradict his affidavit annexed to his petition for injunction, and which motion was withdrawn by permission of the court. We do not think the fact of filing such a motion produces the effect given to it by the judge. It is not an admission of the simulation, but, as we presume, the interpretation which plaintiff's counsel gives of the tendency of such interrogatories.

When put on the stand to answer them, the plaintiff asserts the reality and good faith of his purchase, his ability to pay the price, and the actual payment thereof. The cash portion was paid in the presence of the notary or recorder, who, however, says he doubted the reality of the transaction because the judgment of these defendants against the vendor was then rendered, and, as he says, recorded, although there is no certificate of recordation on the copy introduced in evidence. The testimony in support of the reality of the sale is not, in our opinion, overcome.

We deem it unnecessary to pass on the motion to dissolve, because, if the technical objection to the bond be well made, the plaintiff would have the right immediately to another injunction.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of plaintiff, perpetuating the injunction herein, with costs in both courts.

Rehearing refused.

No. 5635.

JOSEPH MOORE *v.* MRS. SALLIE POPE and husband; WILLIS J. POPE, intervenor.

It matters not what informalities affect the sale from Mrs. Pope, one of the defendants, to the intervenor. As the plaintiff is not a creditor of the seller, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given to the intervenor.

APPEAL from Thirteenth Judicial District Court, parish of Tensas. *Hough, J. L. V. Reeves and E. Lewis*, for plaintiff and appellee. *Drake & Garrett, Semmes & Mott*, for defendant and intervenor.

WYLY, J. The plaintiff sued the defendant, Mrs. Sallie Pope, on an account of some \$900, for supplies advanced to a plantation which he alleges she cultivated in 1871, and alleging that she was about to leave the State permanently, he prayed for and obtained an attachment, under which three mules and a wagon were attached as her property.

Willis J. Pope intervened, claimed the property attached, and prayed to be decreed the owner thereof, and for judgment against plaintiff for two thousand dollars damages and one hundred dollars attorney's fee.

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Pending the litigation, the property was sold by order of the court, and the proceeds are in the hands of the sheriff.

At the trial the court finding that the debt demanded of Mrs. Sallie Pope, a married woman, did not inure to her benefit, gave judgment in her favor against the plaintiff. It however decreed the sale of the mules and wagon from Sallie Pope to the intervenor, null and void at the instance of plaintiff.

From this judgment the intervenor alone has appealed.

The motion to dismiss the appeal, because the conditions stated in the bond are not in exact accordance with articles of the Code of Practice, is without weight. The bond was given in reference to the law, and, however inartistically drawn, it is a good bond. The motion is therefore denied.

As the plaintiff has not appealed, the decree below finally establishes that he is not a creditor of the defendant, Sallie Pope. Not being a creditor of the person against whom the attachment was directed, the plaintiff is without interest in this court to contest with the intervenor in regard to the validity of the sale of the mules and wagon to him by Mrs. Sallie Pope. It is shown he was in possession and had paid Mrs. Pope some six hundred dollars for the property. As neither Mrs. Pope nor any creditor of hers has demanded the nullity of the sale, it can not be rightfully decreed—at least at the demand of the plaintiff herein. But the plaintiff insists that, as Mrs. Pope claims no damages for the wrongful levy of the attachment, he has an interest in showing that the conveyance from her to the intervenor was invalid, because by so doing he will escape the claim for damages herein set up by the intervenor.

This suggestion is unworthy of consideration by the court. Parties are at liberty to convey their property as they please, and only their creditors, who are injured thereby, have cause to complain. It matters not what informalities affect the sale in question, as the plaintiff is not a creditor of the seller, Mrs. Pope, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given by Mrs. Pope to the intervenor.

The actual damages sustained by the intervenor by the wrongful attachment of the three mules and the wagon we fix at three hundred dollars.

It is therefore ordered that the judgment herein, so far as it relates to the intervenor, Willis J. Pope, be annulled, and it is decreed that the intervenor was the owner of the property attached, and that he recover from the sheriff the proceeds of the sale thereof.

It is further ordered that he have judgment against the plaintiff for three hundred dollars damages and costs of both courts.

Rehearing refused.

No. 5644.

CARRIE A. DRAKE AND HUSBAND v. THOS. P. HAYS et als.

Defendants, who were members of the late commercial firm of Cornwell & Hays, refuse payment of a note of said firm which was executed to plaintiff, separate in property from her husband, before said separation had taken place. Previous to the existence of the firm of Cornwell & Hays, there existed the firm of L. S. Cornwell & Co., which owed plaintiff borrowed money to the amount of the note in suit. In liquidation of this debt of L. S. Cornwell & Co., the liquidating partner of that firm gave plaintiff the note sued on, having previously consigned to the factors of said Cornwell & Hays forty-four bales of cotton belonging to said firm of L. S. Cornwell & Co. in liquidation. The proceeds of this cotton, exceeding the amount of the note, passed to the credit of Cornwell & Hays on the books of their factors. Thus, the liquidating partner of L. S. Cornwell & Co., instead of paying over to plaintiff the sum which was due to her, passed that sum, the proceeds of the cotton, to the credit of Cornwell & Hays, and executed to plaintiff the note of the last named firm, of which he was a partner. Therefore the firm of Cornwell & Hays received a valuable consideration for the note and plaintiffs' claim is established.

It is shown that the money loaned by plaintiff was her paraphernal property. Whether or not the husband was a member of either firm, or both the aforementioned firms, is immaterial.

The plaintiff is not bound by statements made out of her presence by the partners at the partition of the partnership of Cornwell & Hays.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. W. B. Spencer and L. V. Reeves, Semmes & Mott*, for Thomas P. Hays, defendant and appellee. *Drake & Garnett*, for Mrs. Hays, defendant and appellee. *Steele Clinton & Farrar*, for plaintiff and appellant.

WYLY, J. Carrie A. Drake, a married woman, separated in property from her husband, brings this suit against the defendants, who were members of the late commercial firm of Cornwell & Hays, on the note of said firm for \$3000, which was executed to plaintiff before she obtained said separation of property.

The court rejected the demand, and plaintiff appeals.

Previous to the existence of the firm of Cornwell & Hays there existed the firm of L. S. Cornwell & Co., which owed plaintiff borrowed money to the amount of the note in suit.

In liquidation of this debt L. S. Cornwell, the liquidating partner of the firm of L. S. Cornwell & Co., gave plaintiff the note sued on, and having previously consigned to the factors of said Cornwell & Hays forty-four bales of cotton belonging to said firm of L. S. Cornwell & Co. in liquidation. The proceeds of this cotton, exceeding the amount of the note, passed to the credit of Cornwell & Hays on the books of their factors. This fact, proved by Cornwell, the partner who executed the note in suit, stands uncontradicted.

It appears, therefore, that the liquidating partner of L. S. Cornwell & Co., instead of paying over to plaintiff the \$3000 which was due her, passed that sum, the proceeds of the cotton, to the credit of Cornwell & Hays and executed to plaintiff the note of the last-named firm, of

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which he was a partner. The firm of Cornwell & Hays received therefore a valuable consideration for the note.

It is shown that the money loaned by plaintiff as before stated was her paraphernal property administered by herself.

Whether or not her husband was a member of either or both the aforementioned firms is immaterial. So, also, the statement of Cornwell made out of her presence in regard to the note in suit.

She was not present and is not bound by statements made by the partners at the partition of the partnership of Cornwell & Hays.

It is therefore ordered that the judgment herein be annulled, and that there be judgment against the defendants *in solido* for three thousand dollars, with legal interest thereon from first November, 1870, and costs of both courts.

Rehearing refused.

 No. 4085.

J. W. BANNING v. R. BLEAKLEY & Co.

Factors and commission merchants, when exercising their functions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intentment of the thirty-third section of the bankrupt law of 1867, and are not released from obligations contracted in that capacity by a discharge in bankruptcy.

To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established that it must be shown that the owner or consignor knew of such custom and usage and assented to it.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. McGloin, Kleinpeter & Nixon*, for plaintiff and appellee. *Lacey & Butler and Samuel P. Blanc*, for defendants and appellants.

TALLAFERRO, J. Suit is brought against the defendants for \$1138 33, alleged to be proceeds of sale of one hundred and sixty boxes of cheese and fifty kegs of butter, consigned by plaintiff to the defendants, to be sold by them on plaintiff's account, as his agents and factors, and which, as plaintiff alleges, was sold by the defendants in their fiduciary capacity as his agents, who have failed to account to him for the proceeds, and have illegally and fraudulently converted the same to their own use and benefit. He claims from the defendants the said sum of \$1138 33, with legal interest from the thirteenth July, 1867.

The defendants admit that on the thirteenth July, 1867, they were indebted to the plaintiff in the sum of \$1138 33, but deny that they owe them anything now; that they have been forever released and discharged from all liability to plaintiff on account of the alleged indebtedness, by their discharge in bankruptcy by decree of the United

States District Court for the district of Louisiana, rendered on the thirteenth January, 1869, and they specially plead their discharge in bar of plaintiff's claim. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

In this case the following inquiry arises: Does a consignee in selling goods consigned to him for sale on commission, act in a fiduciary capacity, according to the meaning and intendment of the thirty-third section of the bankrupt law of the United States, enacted in April, 1867, and is the obligation he is under to faithfully account for and pay over to his consignor the proceeds of the goods thus sold, one from which he is relieved by a discharge in bankruptcy?

The thirty-third section of the act of Congress, approved March 2, 1867, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," provides "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise."

The terms and phraseology used in the bankrupt act of 1841, in treating of the same subject matter, are to some extent unlike those just quoted from the act of 1867, and no small difference of opinion exists as to whether the words and expressions employed in the thirty-third section of the act of 1867 are to be construed as having the same meaning and import that are conveyed by those used in the first section of the act of 1841.

The first section of that act provides that "all persons whatsoever, residing in any State, territory or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, shall, on compliance with the requisites of the bankrupt law, be entitled to a discharge under it."

The Supreme Court of the United States, in its interpretation of the act of 1841, in the case of *Chapman v. Forsyth*, 2 Howard 202, decided that a factor is not within the act, because "the cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian' or 'trustee,' are not cases of implied, but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract." On the part of the defendant it is

argued that the case of *Chapman v. Forsyth* is conclusive of the questions raised in this litigation, the defendant holding that the provisions of the thirty-third section of the act of 1867 are substantially the same as those of the first section of the act of 1841 in regard to fiduciary trusts. In support of this position he refers us to the case of *Cronan v. Cotting*, decided by the Supreme Court of Massachusetts in 1870, a case arising under the bankrupt act of 1867, in which that court said: "Our conclusion is, that this provision of the bankrupt act of 1867 (relating to fiduciary trusts) was framed in view of, and with the intent to adopt the construction which the Supreme Court of the United States had put upon the similar clause in the bankrupt act of 1841. We adhere to that construction as applicable to the act of 1867, until the same court shall declare otherwise."

The facts of this case were that *Cronan*, the plaintiff, delivered accepted bills of exchange to the defendant, as administratrix of her husband's estate, with directions to collect them and apply so much of the proceeds as might be necessary to the payment of debts owing from him to the estate, and to pay over to him the remainder. The court held that the phrase "fiduciary character" did not include the obligation of the administratrix to dispose of the bills of exchange and apply the proceeds according to the directions of the plaintiff. In the case under consideration we are referred by the defendants' counsel to the case of *Grover & Baker v. Clinton*, 8 National Bankruptcy Register 312, decided in the United States Circuit Court for the Western District of Wisconsin, in 1873, in which it was held: "That money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a fiduciary capacity within the meaning of the bankrupt act; that a bankrupt is not liable to arrest on such a debt, and that it will be discharged in bankruptcy."

In behalf of the plaintiff, on the other hand, it is contended that the benefits arising from bankrupt laws are intended for the honest but unfortunate debtor, but they can not avail him who, having the goods of another confided to him, converts them into cash, and, instead of considering money so obtained as a sacred deposit, mingles it with his own funds and with it redeems his own obligations. A distinction is drawn between an ordinary debt and a debt of the character on which the plaintiff sues in this case. In the one case it is held that the reliance is upon the solvency of the debtor, and upon the sufficiency of his assets to meet his debts; in the other it is upon his probity and moral responsibility. In the one case the creditor takes the risk of substituting the credit of the debtor for the goods which are sold to him, and vests in him the absolute title to the goods; in the other the de-

positor parts with none of his rights in the goods deposited, but simply intrusts them to the depositary for a specific disposition to be made of them.

In favor of the construction maintained in behalf of the plaintiff, we are referred to several decisions by tribunals of last resort in some of our sister States. In the case of *Whitaker v. Chapman et al.*, 3 *Lansing* (N. Y. Rep.) 155, plaintiff sued to recover from defendants, who were partners and factors, or commission merchants, doing business in the city of New York, the proceeds, less commissions, of one hundred and fifty-two boxes of cheese, which plaintiff claimed to have delivered to the defendants to be sold for cash, with immediate return of proceeds to him. The defendants denied that the cheese had been delivered to them to be sold for cash, and claimed to have received the cheese for sale with a guarantee to the plaintiff of payment for the sales made by them according to the custom of their trade, and they severally set up a discharge in bankruptcy. It was proved in this case that the commodity was received by the defendants to be sold by them on commission; that it was sold by them; that there was a balance due the plaintiff of the net proceeds, which had not been paid over, but had been converted to their own use. It was held by the court that the defendants, in the receipt and sale of the cheese, acted in a fiduciary character on behalf of the plaintiff, and that the discharge in bankruptcy of the defendants, and each of them, did not discharge them or either of them from the debt.

In the case of *Duguid v. Edwards*, 50 *Barbour*, N. Y. Reports 290, the plaintiffs sent a quantity of flour to the defendants, who were commission merchants at Albany, to be sold by them in the course of their business. They sold a portion of the flour at Albany, shipped a part of it to New York, which was sold there, and returned the residue on hand to the plaintiffs, when the defendants failed in business. For the non-payment of a balance of \$211 remaining in their hands from the proceeds of the sales actually made by them, and for the value of one hundred and fifty barrels of flour sent to New York and sold there, the proceeds of which were never returned to plaintiffs, an order of arrest was taken against the defendants. In their defense they set up certain usages and circumstances from which they claimed that their relations to the plaintiffs were not those of ordinary factors, but were substantially those of debtor and creditor; that when they received the flour they were carrying on a general commission business at Albany. When property was consigned to them for sale they paid the freight and other charges against it, and when they sold it they did so in their own names, either separately or with other property of the same description belonging to other parties, as might prove convenient and suitable for

their customers; receiving payment for it in gross, and crediting the plaintiffs their proportion of the purchase price; that they deposited the proceeds of their sales in general account without distinguishing the portions owing from the sales of the property of every particular individual, and in making payment to their principals or consignors, they did so by accepting and paying the drafts drawn by them for the balances appearing by way of credits upon their books, or by remittances made directly to them. From this mode of transacting their business, and which the defendants showed was followed by others engaged in the same business at Albany and other commercial cities, the defendants insisted that the moneys they received from the sale of the plaintiffs' flour became their property, instead of the property of the plaintiffs, and they became indebted simply to the plaintiffs for the balance remaining in their hands after their advances and commissions were deducted. The court, after discussing at considerable length the relations existing between the principal and factor, decided that "where a particular mode is adopted and pursued for the transaction of the business of another, with his knowledge and assent, he will be concluded by it, and subject to all the consequences resulting from it. But where that differs from the settled duties and obligations established by law, such knowledge and assent must be shown before the party intrusting his business to another can be affected by the change; that commission merchants to whom property is consigned by the owner are the factors of the owner. They do not acquire any title or interest in the property itself beyond a mere lien for their advances in paying the expenses of its transportation to them. If they have actually made further advances upon the faith of consignments made to them, that will give them no title to the property, but will merely increase the extent of their lien. When they sell the property, even though they do so in their own names, and may consequently be regarded by the purchaser as the owners of it as between themselves and the consignors they will be deemed as selling as the agents of the latter, and as selling their property. There is nothing in such a transaction which will vest the factors with the title to the proceeds derived from such sales. On the contrary, they will receive such proceeds as the substitute or representative of the property sold, subject to the same lien, under the trust, implied of course, that the excess beyond what shall be required to discharge such lien will be held for and paid over to the consignors. If the factors mingle such proceeds of sales with their own funds, by depositing them in bank to their credit in a general account, use the money in their business generally, and fail to pay over the same on demand, they thereby subject themselves to the legal liabilities arising from the misapplication of another's property, and to an arrest, under

the provisions of the Code, as having received the money in a fiduciary capacity. The understanding of the Legislature seems to have been that factors, agents and brokers, when acting in their capacities as such, are acting in fiduciary capacities, and they have accordingly provided for their arrest, as well as for the arrest of all other persons who may receive and misapply moneys received by them in the course of their fiduciary relations. Customs and usages which would have the effect of relieving a party from the duties and obligations the law would otherwise impose upon him, are not allowed to prevail unless the actual assent of the other party is secured for their observance, or they are of so notorious a character as reasonably to lead to the conclusion that he must have known of their existence and intended to assent to them. And even then they must not be unreasonable nor positively unlawful. That the usage or custom itself will not be sufficient to deprive a party of the rights otherwise secured to him by law, is so well established by the decisions as to need only a reference to them to confirm that conclusion." 14 Johnson, 316; 1 Seld. 95, 101, 102; 16 N. Y. Rep. 392, 401, 402; 34 N. Y. Rep. 413.

That a commission merchant or a factor stands in a fiduciary relation to his principals, within the meaning of the bankrupt act of 1867, was decided by the Supreme Court of Missouri, in the case of *Lenecke v. Booth*, 47 Missouri Reports, 357, *Post*. In that case the court said:

"The question is here presented whether a factor or commission merchant stands in a fiduciary relation to his principals in respect of the proceeds of sales of commission goods within the meaning of section thirty-three of the bankrupt act of 1867. The section provides that 'no debt created by the fraud or embezzlement of the bankrupt or his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act.' The corresponding provision in the bankrupt act of 1841 excluded from its benefits 'all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.' The 'fiduciary capacity' here mentioned was held by the Supreme Court of the United States to refer to technical trusts of the character of those previously mentioned, and not to trusts raised by implication of law. It was therefore held that an indebted factor or commission merchant was not a fiduciary debtor within the meaning of the act of 1841. *Chapman v. Forsyth*, 2 Howard 202. But the above recited provisions of the two acts (of 1841 and 1867) are quite dissimilar. Blatchford, J., in the matter of *Seymour on habeas corpus*, 6 Int. Rev. Rec. 60, distinguishes the two provisions, and comments upon *Chapman v. Forsyth* as follows: 'The Supreme Court held that a discharge under the act of 1841 did not re-

lease the bankrupt from any such debts (as were mentioned in 'the clause of the act of 1841 above quoted); and that no debt fell within the description of a debt created by a defalcation while acting in any other fiduciary capacity, unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held that the language of the act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard and character. That was clearly so under that act. But in the act of 1867 the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity. Therefore, under the act of 1867,' says the judge, 'no debt created by the defalcation of a bankrupt, while acting in any fiduciary capacity, will be discharged.' These views are approved by Nelson, J., in his decision *in re Kimbal*, 6 Blatchford 292. A commission merchant acts in a fiduciary capacity and the trust attaches to the goods consigned to him for sale on commission, and to their proceeds when the goods are sold. *Chapman v. Forsyth*, *supra*; *Duguid v. Edwards*, 50 Barbour 288. Concurring in the views of Judge Blatchford, as above quoted, the judgment will be affirmed."

The case in 6 Blatchford 292, *in re Kimbal*, was decided in the Circuit Court of the United States for the second circuit, by Judge Nelson, Associate Justice of the Supreme Court of the United States. The defendant had received a quantity of buckwheat flour to sell on commission and remit the proceeds less the commission. The flour was sold and the defendant received \$758 79 over and above the commission, but no part of the proceeds was paid over. Soon after, the defendant applied for the benefit of the bankrupt act, having applied the money to his own use. Mr. Justice Nelson said:

"Looking at it [the case] as thus presented, it seems to me there is great difficulty in saying that the flour was not received and held by the bankrupt in a strictly fiduciary character. The article was placed in his possession simply to sell it and to remit the proceeds over and above his commission. The money was not the bankrupt's when it was received on the sale, but was the money of the owner of the flour. It was a gross breach of trust to apply it to his own use. I have looked at the case of *Chapman v. Forsyth*, 2 Howard 202, but do not regard it as controlling the one in hand. The provision in the present act is much broader than in the act of 1841."

The factor or commission merchant receiving from the owner property consigned to him to be sold, and the proceeds to be returned to the owner, or kept for his disposal, we can regard in no other light

than that of acting in a fiduciary capacity. The doctrine contended for as arising from custom and usage, that the property consigned, or its proceeds, becomes the property of the factor, for which he simply becomes the debtor of the owner, has no foundation in equity or reason. The party consigning his property to the care of another, and placing it at his disposal for the benefit of the owner, is not presumed to recognize any such doctrine. The natural and obvious presumption is that the consignor confides in the probity and the sense of justice and honor of his factor, that he will dispose of the property sent to him for sale to the best interests of the owner, and that he will securely keep and return to him, when required, the money for which the property was sold, after deducting the expenses and a fair compensation for his services in disposing of it. Every prudent dealer seeks to have the greatest amount of security practicable in his business affairs. Such a person would surely feel more secure when relying upon the simple obligation of the agent to securely keep and return to him the money in his hands, the proceeds of sale of his property, than to know that such proceeds were intermixed with the moneys of the agent, and to be used by him as his own, leaving the principal to rely solely on the credit and responsibility of the factor, thus taking all the risks and casualties of trade which might overwhelm his factor in bankruptcy and financial ruin, and throw upon himself the loss of the property intrusted to his factor. To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established, as we have seen, that it must be shown that the owner or consignor knew of such custom and usage, and assented to it. The custom insisted upon by the defendants as prevailing in this respect in New Orleans is not proved to have been known by the defendant, and that he assented to it.

We conclude that factors and commission merchants when exercising their functions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intentment of the thirty-third section of the bankrupt law of 1867, and are not relieved from obligations contracted in that capacity by a discharge in bankruptcy. In this conclusion we think we are abundantly sustained by the decisions and authorities we have adverted to.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

Mrs. Mary C. Gordon v. Gilfoil.

No. 5665.

MRS. MARY C. GORDON v. PATRICK GILFOIL—J. H. GILFOIL Intervening.

An actual corporeal possession of property seized must take place in order to make a sheriff's seizure valid, and to render a compliance with the law complete. The sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly appointed and authorized by him.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & W. Farrar*, for plaintiff and appellant. *Morrison & Montgomery*, for defendant and appellant. *J. O. Seale*, for intervenor and appellee.

TALIAFERRO, J. Under an order of seizure and sale against the property of the defendant at the suit of the plaintiff, sale of the tract of land now in controversy was made on the third day of July, 1869, the plaintiff becoming the purchaser. The defendant remained in possession. On the fifteenth of January, 1872, plaintiff brought this suit, setting up title under the sheriff's sale, and praying to be recognized as owner, and to recover the property.

The defendant answered, setting up the nullity of all the proceedings under the order of seizure and sale, and averring that none of the forms of law were observed in making the sale, specifying several of the alleged informalities. J. H. Gilfoil, the son of the defendant, intervened, claiming one-half the land in right of his deceased mother, the land being community property between herself and the defendant. Pending this suit, it seems, the defendant died, and the plaintiff filed a supplemental petition making the intervenor a party defendant, as heir of his deceased father. The intervenor, answering this supplemental petition, pleads a general denial, and specially pleads the nullity of the proceedings under which the sale of the property is alleged by plaintiff to have been made by the sheriff; that the pretended sale is null as to him, who was no party to the proceedings.

It is alleged that there was no notice of seizure given in the proceeding *via executiva* as the law requires, and that the sheriff's return of service of the notice is defective and illegal; that no legal and valid seizure of the property was made.

We think the defendant has shown that the exception in regard to the seizure was well taken, and must prevail. The proof is, that the sheriff at no time had the mortgaged property in his possession, either under his personal control or under that of a keeper. The defendant, Patrick Gilfoil, remained, after this pretended seizure, in undisturbed possession of the premises, managing and controlling the place exclusive of everybody else. An actual corporeal possession of property seized must take place in order to make a sheriff's seizure valid, and

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to render a compliance with the law complete. The sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly appointed and authorized by him. See the case of *Corse v. Stafford*, 24 An. 262, and cases there cited.

We regard the seizure in this case as a mere paper seizure, and the sheriff's sale as a nullity.

It is therefore ordered that the judgment of the lower court, so far as it is rendered in favor of the plaintiff, be annulled and avoided; that its decree in favor of the intervenor be affirmed. It is now further ordered that there be judgment in favor of the defendant, the plaintiff paying costs in both courts.

Rehearing refused.

No. 5652.

MRS. CORINNE TESSON AND HUSBAND v. A. L. GUSMAN et als.

As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer that they know not the signature, but, on the contrary, aver that it is an act under private signature void for simulation, or null as a disguised donation for informalities, the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses, and the preliminary evidence on which the deed had been admitted to registry.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff, and parole evidence in support of said charge was properly rejected.

As the ancestor of defendants could, however, have shown the simulation of the sale by a counter letter or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for confessed, and they establish the simulation of the sale beyond doubt.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. Favrot & Lamon*, for plaintiff and appellee. *S. P. Greves* and *E. W. Robertson*, for defendants and appellants.

WYLY, J. Plaintiff, Corinne Tesson, brings a petitory action to recover from the defendants, the heirs of Gabriel Gusman, a lot of ground and improvements, situated in the city of Baton Rouge, purchased from their ancestor on the twenty-eighth of March, 1872.

After a general denial the defendants specially aver that the pretended act of sale sued on was an act under private signature, no price was paid, the vendor remained in possession until his death, receiving the rents of the property, and it was assessed as the property of the vendor, Gabriel Gusman, after the pretended sale; that said pretended sale was a mere simulation, not intended to convey any title to said lot, and did not convey any title; that should it appear that said

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Gusman intended to convey title to plaintiff, then respondents plead that the intention was that it should take effect only after the death of said Gusman, as a donation, and as such the said act was not clothed with the formalities required by law for a donation, either *inter vivos* or *causa mortis*, and said act is, therefore, null and void.

The plaintiff moved to strike out the answer on several grounds, the most important being that the defendants having accepted unconditionally the succession of their ancestor, can not be heard to plead or allege that his sale to plaintiff was simulated, and, standing in his stead and place, they can not set up any defense which he, if living, could not make.

The court overruled the exception, reserving the right to the plaintiff to object to the evidence when offered by the defendants. 20 An. 193. The case was before this court in March, 1874, and was remanded because the court *a qua* erroneously received in evidence a copy of the act of sale, an act under private signature, not the best evidence. The second trial, like the first, resulted in judgment for plaintiff, and defendants, except one of the heirs, have appealed.

As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer they know not the signature, but, on the contrary, aver that it is an act under private signature, void for simulation, or null as a disguised donation for informalities, we are of the opinion the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses and the preliminary evidence on which the deed had been admitted to registry. Revised Code 2244.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff; and parole evidence in support of said charge was properly excepted to. *Collins v. Pratt*, 15 An. 42, *Labauve v. Boudreau*, 9 R. 29, *Maples v. Mitty* 12 An. 759.

As the ancestor of defendants, however, could have shown the simulation of the sale by a counter letter, or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for confessed, and they establish the simulation of the sale beyond doubt. See *Semeré v. Semeré*, 10 An. 704, and authorities there cited.

It is therefore ordered that the judgment herein be set aside, and it is decreed that there be judgment for the appellants, plaintiff paying costs of both courts.

Rehearing refused.

No. 5622.

CURRIE, KING & CO. v. J. O. PIERCE et als. SCOTT & BROTHER v.
The Same. (Consolidated.)

While there are facts in the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and the son as to the creditors of the former, yet the sale of the property in question from the former to the latter can not be treated as a pure simulation. The sale may have been resorted to for the purpose alleged by the plaintiff, but, whether for fraudulent purposes or otherwise, could only have been successfully assailed by a regular revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

A PPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. Pilcher, Leonard & Kennedy*, for plaintiffs and appellees. *Montgomery & Roberts*, for defendants and appellants.

TALIAFERRO, J. The plaintiffs, in these consolidated cases, attack a sale made on the fifth of April, 1871, by Jonathan O. Pierce to his son John O. Pierce of an undivided half part share and interest of and in a large and valuable plantation lying in the parish of Carroll called "The Oakland plantation," and they seek to have the sale annulled and set aside on the alleged ground that it was made in fraud of their rights and for the purpose of placing the property out of their reach and shielding it from being made subject to the debts owing them by Jonathan O. Pierce. They allege and show that they are creditors of said Jonathan O. Pierce to large amounts, and they aver that he was in insolvent circumstances at the time he made the sale, which they allege is fictitious, simulated and fraudulent.

Curators *ad hoc* were appointed to represent the several absent parties made defendants. John O. Pierce answered, denying all the allegations of the plaintiffs, charging him with fraud and simulation in the purchase of the property in question, and averring that he gave in payment of the price a part in cash and the remainder in his obligations, to be paid in installments, which he has been discharging as they have matured. He pleads in bar of the action brought against him the prescription of one year. In the lower court there was judgment in favor of the plaintiffs annulling and setting aside the sale so far as it affected the plaintiffs' rights, and rendering judgment in favor of the plaintiffs against Jonathan O. Pierce for the amounts claimed, and ordering that the property be seized and sold to pay the said debts of the plaintiffs. J. O. Pierce, Jr., has appealed.

The record contains a large amount of testimony. The plaintiffs have used much industry to draw out of J. O. Pierce, Sr., by searching interrogatories to him and by a long cross-examination of J. O. Pierce, Jr., on the witness stand, evidence to show that the sale was simulated, and in truth without consideration. The mother of J. O.

Pierce, Jr., was interrogated, also under commission, in relation to the character of the act of sale, she having sold her interest in the Oakland plantation to her son at the same time the father sold his. We think the plaintiffs have shown that about the time of the sale, April, 1871, Jonathan O. Pierce was in failing and insolvent circumstances, but we do not find that they have brought home to J. O. Pierce, Jr., a knowledge of that fact. While we are free to admit there are facts shown by the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and son as to the creditors of the former, yet, after a careful examination of the whole evidence, and considering the attendant circumstances, we are not inclined to regard the sale as a pure simulation. We can not therefore concur with the judge of the court *a qua* in treating it as such. The sale may have been resorted to for the purposes alleged by the plaintiffs, but whether for fraudulent purposes or otherwise, we think it could only have been successfully assailed by a regular revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that the defendants have judgment in their favor; the plaintiffs paying costs in both courts.

Rehearing refused.

No. 5448.

SUCCESSIONS OF GEORGE AND FRANCES CLARK—On opposition to the account of the executrix.

The assets shown as composing the separate succession of Mrs. Clark being her separate property, distinct from the assets of the succession of her husband, the opponent can not claim payment out of these assets for his debt, which is a community debt due by the community estate.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. McGloin & Nixon*, for Mrs. H. C. Stewart. *Frank Michinard*, for executrix, appellee.

TALIAFERRO, J. George Clark died on the third of March, 1873, and his wife, Frances Clark, died on the same day, a few hours only after the death of her husband. They left olographic wills, by which each testator was appointed executor of the other. Mrs. Clark had no forced heirs. She gave a portion of her estate to her husband, and a portion of it to the minor children of Julia M. Hubbard, the widow of Edward E. Willard, the adopted son of Frances Clark. Mrs. Willard applied for and received the appointment of dative testamentary executrix of

George Clark and Frances Clark, and she caused inventories to be made of their estates.

On the twenty-fifth of August following she filed her accounts, one of them showing the succession of George Clark to be a small one, the entire proceeds of which are absorbed by the privileged debts against it; the other showing a balance for the minor children of E. E. Willard of about \$8000, after the payment of its debts.

A sweeping opposition was filed to these accounts by Mrs. Stewart, in whose behalf it is urged that all the property of both successions, as divided by the executrix, belong to and form only one succession—that of the community existing between the decedents—and that the opponent's claim should be acquitted out of the entire assets of both. The opponent's claim is founded upon a contract of lease entered into between George Clark and the opponent on the fourteenth of October, 1872, by which the opponent leased to Clark a dwelling house in the city of New Orleans for a term of five years from the date of the lease, at \$1000 per annum, payable in monthly installments of \$83 32 each. The opponent's claim is for this rent, due and to become due. The executrix placed the opponent on her tableau of George Clark's estate as a privileged creditor for \$500, amount of rent due at that time. That sum, with the other privileged debts of the estate, consume it, so that the opponent gets nothing more if he is restricted to the estate of George Clark for payment.

The judge *a quo* rejected this opposition, so far as the opponent claimed payment out of the proceeds of the estate of Mrs. Clark. This opponent objected also to the amount set down upon the tableau of Mrs. Clark's estate for attorney's fees as exorbitant. This opposition was sustained, and the amount reduced from \$250 to \$100. After making some other unimportant changes in the accounts they were duly homologated.

From this judgment the opponent has appealed.

We think the judgment of the lower court correct. It is very clear that the assets shown as composing the separate succession of Mrs. Clark are her separate property. They are made up of only two items, viz: \$103 50, value of a few articles of jewelry and silverware, and \$5715 in cash received from the Knickerbocker Life Insurance Company on a life insurance policy on the life of her husband taken out for her benefit.

The opponent can not claim payment out of these assets for his debt, which is a community debt, owing by the community estate.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 5659.

SUCCESSION OF MRS. S. B. FUQUA.

The motion to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk can not prevail. The bond was executed in favor of John S. Lanier, whom the record shows to be clerk.

The peremptory exception to the jurisdiction of a special judge to issue an order granting letters of executorship *ratione materiae* was properly overruled. Under the facts of this case the parish judge proceeded lawfully in selecting a lawyer having the proper qualifications to preside over the trial in his place.

The instrument admitted to probate must be received as a will. It is in the olographic form, entirely written, dated, and signed by the testatrix. It is not essential that the date to an olographic will should precede the signature; it may be placed below.

There is no *fidei commissum* in the will. The testatrix does not attempt to put any property in the name of any person except her children. All she does is to direct how that property shall be administered until her children shall marry.

The intention of the testatrix expressed in her will is that her husband should have the entire control of her children; that they should make their homes with him, and that he should control their property until they married. Her wishes could not be carried out unless he was their tutor; hence it was, in intendment of law, his appointment as tutor. That she had the right to appoint him can not be doubted.

Because a cotutor is liable to account for property belonging to minors which may have come into his hands, it does not follow that he can not be appointed their tutor by testament.

The declaration of three of the five members of a family meeting called in the interest of the minors, that the appointed tutor is not a fit person to have charge of the minors, can not be taken into consideration. In the first place, there was nothing to authorize the family meeting, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. This court can not say in advance that the mother's choice of the person who, in her opinion, was best fitted to have charge, of the minors was ill-advised.

APPPEAL from the Parish Court, parish of East Feliciana. *E. E. Adams*, special judge, in the place of the presiding judge, recused. *Kernan & Lyons*, for tutor and executor, appellee. *B. R. Forman, K. A. Cross*, for under tutor, appellant.

MORGAN, J. A motion is made to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk. The bond was executed in favor of John S. Lanier, whom the record shows to be the clerk. This is sufficient. (See the case of *Riley v. Howell*, lately decided.) The motion to dismiss is overruled.

ON THE MERITS.

The contest grows out of the following document:

"Feeling this evening the uncertainty of life and shortness of time, I give vent to my feelings in writing. Should God in his wisdom see best to remove me hence, to that home where no traveler returns, in my approaching confinement, 'tis my wish that my dear husband, T. J. Fuqua, have the entire control of my children; they making their homes with him, and controlling their and my business until the marriage of each, at which time he must give them, Addie and Pinkie, five thousand dollars and their trousseaux; and controlling the eleven thousand dollars belonging to me, until Pinkie becomes of age, at

which time it must be equally divided between my children. Should Addie be married, her portion of the interest on what belongs to me, eleven thousand dollars, be paid her yearly until Pinkie becomes of age. Should Mr. Fuqua marry, I want all my silver, beds, and bedding be given to Addie and Pinkie, and they to give a portion of it to my Fuqua child when grown; and if he marries, 'tis my wish that his third wife never be benefited by anything that belonged to me, in any way, and in case of my Fuqua child's death, what it would inherit from me be given to Addie and Pinkie whenever my husband thought proper.

"Being in health and in my right mind, I hereby sign my full name.

"MRS. SARAH B. FUQUA.

"September 12, 1873."

Mrs. Fuqua died some time after the date of the above writing. On the tenth March, 1874, it was admitted to probate as her last will, and T. J. Fuqua, her surviving husband, was appointed executor thereof. On the twelfth March, J. W. Clinton, the under tutor of Mrs. Fuqua's children, moved to rescind the order appointing Fuqua executor. The appointment was rescinded. A motion was made for a rehearing. Pending this motion, the judge died. His successor recused himself on the ground of having been of counsel, and a lawyer was selected as special judge, to try the case. This was done by consent of counsel. After the rescinding order had been revoked, and the original order appointing the executor reinstated, a peremptory exception to the jurisdiction of the special judge to issue an order granting letters of executorship *ratione materie* was taken. The exception seems to be based upon the 2024th section of the Revised Statutes, which provides that "the district judges of the several judicial districts of this State, or the parish judge of any adjoining parish shall, in the absence of the parish judges from their respective parishes, or when the parish judge is interested, or from any cause is recused or can not act, grant all orders of any and every kind in cases of any kind in the parish courts which might have been granted by the parish judge if not absent or recused, which absence or recusation must be made to appear by the affidavit of the party or his attorney who applies for such order." The exception was properly overruled. It was a regular suit which was pending in court, the contest being the right to be qualified as executor of a will, one party asserting it, another contesting it. The parish judge had been of counsel for one of the contestants; he was not personally interested in the matter in contestation. The constitution, act 90, provides that "in any case where the judge may be recused, and where he is not personally interested in the matters in contestation, he shall elect a lawyer, having the qualifications required for a judge of his

court, to try such cases. And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case." It is evident, therefore, under the facts of this case, that the parish judge proceeded properly in selecting a lawyer having the proper qualifications to preside at the trial in his place.

We come now to consider whether the instrument above quoted is a will. We are of the opinion that it is. It is in the olographic form, entirely written, dated and signed by the testatrix. Objection is made that the date is not affixed in the proper place. It is not essential that the date to an olographic will should precede the signature; it may be placed below. See *Cain de Lisle*, under art. 970 C. N., No. 30, where the authorities upon this point are cited. By it she certainly disposes of her estate, and directs how it shall be administered. This is all that the law requires. Nor do we see any *fidei commissum* contained therein. She does not attempt to put any property in the name of any person except her children. All she does is to direct how that property shall be administered until her children shall marry.

We are not called upon to pass upon the question as to whether or not the will contains the appointment of an executor. All the proceedings had in the succession seem to have been copied into the transcript before us. But the appellee, Fuqua, made two separate applications to the court. One was to be qualified as executor; the other was to be confirmed as tutor; and two separate judgments have been rendered on these applications. The appeal seems to have been taken from the judgment confirming him as tutor. And the question now arises, does the will appoint him tutor to the testatrix's minor children?

"In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the terms of the testament." C. C. 1712.

Now what was the intention of the testatrix with regard to her children? It was that her husband should have entire control of them; that they should make their homes with him; and that he should control their property until they married. How could her wishes be carried out unless he was their tutor? It seems to us that the wish she expressed in this regard was, in intendment of law, his appointment as tutor. That she had the right to appoint him tutor can not be doubted.

The last ground of opposition to his appointment is that he is indebted to the minors and is, consequently, excluded from being their tutor. This allegation is not, we think, established. It is possible that he may have received money belonging to the minors while he was cotutor with their mother. This would make him liable to account to them, but all tutors owe an account of their tutorship. We can not say that, because a cotutor is liable to account for property

belonging to minors which may have come into his hands, he can not be appointed their tutor by testament.

It has been pressed upon us that three of the five members of the family meeting called in the interest of the minors have advised that the appellee is not a fit person to have charge of them. The principal objection they make to him is that he is, comparatively speaking, a young man, and that there is no female living in the house with them. In the first place, there was nothing to authorize the meeting of the family, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. We can deprive or exclude a person appointed as this one was only for some of the causes mentioned in the Code. That he is comparatively speaking a young man, and that he has no other female living in the house with the minors, is not among them.

Under the will he has, we think, the right to be appointed tutor to the minors. Should his conduct be such as to make it apparent that the trust the mother reposed in him was ill-founded, the law has pointed out the mode by which they may be protected, and no doubt protection will be given them. We can not say, in advance, that their mother's choice of the person who, in her opinion, was best fitted to have charge of them, was ill-advised.

Judgment affirmed.

Rehearing refused.

No. 5493.

GEORGE LYSLE AND SON v. BEALS & LAINE et al.

Beals & Laine are sued as makers and Edward Beals as indorser of a promissory note.

E. Beals' son, a member of the firm of Beals & Laine, wrote the name of his father, who can not write, as indorser of said note. The evidence showing that Edward Beals subsequently ratified the act or adopted the indorsement, this is sufficient to bind him as indorser.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Rice & Whitaker*, for plaintiffs and appellants. *Bentinck Egan*, for defendant and appellee.

WYLY, J. The plaintiffs, who sued Beals & Laine as makers and Edward Beals as indorser of a promissory note, appeal from the judgment dismissing as of nonsuit their demand against said indorser.

Edward Beals in his answer specially denies that he indorsed the note, averring that he can not write his name.

His son, a member of the firm of Beals & Laine, wrote the name, but the evidence shows that Edward Beals subsequently ratified the

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act or adopted the indorsement, and this was sufficient to bind him as an indorser.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that plaintiffs recover of defendant, Edward Beals, \$1257 36, with legal interest on \$2441 97 from the twenty-first of February, 1874, till the first of April, 1874, and thereafter like interest on \$1257 36 till paid, \$5 56 cost of protest, and costs of both courts.

Rehearing refused.

No. 5689.

HARRIET G. ADAMS v. EDWARD W. ADAMS—JOHN CHAFFE, BRO. & SON—Third Opponents.

There are several reasons why the privileges of the overseer and laborers set up by the third opponents as subrogees, have no preference over the prior mortgage claim of the plaintiff, the most important being that said privileges were not recorded in the parish where the property is situated on the day the contracts out of which they arose were entered into.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *Dewing, J. Johnson & Denis and A. & E. Talbot*, for plaintiff and appellee. *Barrow & Pope and George Wailes*, for third opponents and appellants.

WYLY, J. Plaintiff, holding a special mortgage and vendor's privilege on the plantation of the defendant, to secure her claim of \$36,589 35, foreclosed the same and caused the mortgaged premises and all the accessories and appurtenances to be advertised for sale on the seventh of March, 1874.

John Chaffe, Bro. & Son, claiming to be subrogated to the claims of the overseer and the laborers on said plantation, during the year 1873, amounting in the aggregate to \$5117 83, filed a third opposition a few days before the sale, praying to be decreed to have a privilege for the amount of their claim, on the seed cane, hay, corn, and fodder raised on said plantation during the year 1873, together with the mules, farming implements, and other movables attached to said plantation, and praying that said property be appraised separately, and that they be paid out of the proceeds thereof, in preference to plaintiff. The property was appraised separately and sold with the plantation to plaintiff for \$26,350. Subsequently to wit: on the twenty-first July, 1874, the opponents filed a supplemental petition setting up a privilege as furnishers of seed cane for the crop of 1873, praying judgment for the amount of this claim, \$3000, with privilege on the seed cane, hay, corn, and fodder on the plantation at the time of the seizure, superior to the

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mortgage of plaintiff. The court gave judgment for plaintiff, and the third opponents have appealed.

In regard to the claim for furnishing seed cane for the year 1873, the record shows no privilege on account thereof. True it is, the defendant made a transfer on the seventeenth February, 1873, of the seed cane of the crop of 1872, to the third opponents, in settlement of a balance due by him to them for advances for the year 1872, and on the same day the third opponents retransferred the same seed cane to the vendor for three thousand dollars, taking his note therefor. This was a mere paper transfer. No delivery occurred or could occur, because the evidence shows that the cane had already been planted, and was an immovable. Besides, the contract was not registered in the parish where the property was on the day it was made; consequently, no right was acquired superior to plaintiff's existing mortgage on the property, which was immovable by destination. There are several reasons why the privileges of the overseer and laborers, set up by third opponents as subrogees have no preference over the prior mortgage claim of the plaintiff, the most important being evidence of said privileges was not recorded in the parish where the property is situated on the day the contracts out of which they arose were entered into. Revised Code 3274; see also *Bank of America v. Septime Fortier*, *Edward J. Gay & Co.*, third opponents, lately decided, and authorities there cited.

Judgment affirmed.

Rehearing refused.

No. 5585.

ROBERT J. MOORE v. A. J. BEELMAN—SAME v. MRS. LAURA J. BEELMAN—Consolidated.

The obligations sued upon were entered into subsequent to the homestead law, and are therefore subject to it. These obligations novated a debt previously existing and secured by mortgage. Whether this original mortgage was valid or not for want of reinscription is immaterial. It was abandoned and became inoperative by the consent of the original mortgagee, who received in lieu thereof the new obligations, which are now sought to be enforced.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. J. D. Augustin, N. St. Martin, M. Marks*, for plaintiff and appellant. *Breaux, Fenner & Hall*, for defendants and appellees.

TALIAFERRO, J. In each of these cases the plaintiff is aiming to enforce a mortgage against property of the defendants whose notes, secured by these mortgages, he is the holder of, and is authorized to exercise the rights of mortgage appertaining to the same. These mortgages were granted in favor of one Gassin, the original holder, in

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renewal, as it is declared, of a debt originally owing by the ancestor of the defendants to Gassin, and which was secured by mortgage on the same property.

The facts relating to the execution of the notes sued upon, and the mortgages securing their payment, seem to be as follows: John M. Beelman, the father of these two defendants, and Frederick M. Beelman, being indebted to Gassin in the sum of \$2350, gave his note for that amount on the twenty-eighth of March, 1861, and to secure its payment mortgaged a quarter section of land, reserving fifteen acres of it, on which were certain buildings. F. M. Beelman, for a like sum owing by him to Gassin, gave his note and secured its payment by mortgage on an adjoining quarter section of land owned by him. This occurred in April, 1861. In March, 1866, Frederick M. Beelman sold to his brother, Alexander J. Beelman, one hundred acres of this quarter section, reserving to himself the remainder, about fifty-nine acres and eighty-five hundredths. In this act of sale Alexander Beelman obligated himself to pay \$1468 75 of the debt owing by Frederick M. Beelman to Gassin, with the proportional amount of interest that had accrued. As part of the consideration Alexander Beelman transferred his share and interest in the estate of his father, then deceased, to Frederick Beelman. In May, 1867, the widow of John M. Beelman, and mother of Frederick, Alexander, and Laura Beelman, wife of Tinney, all heirs of John M. Beelman, joined with the heirs in a notarial act by which, in consideration of the undertaking of the heirs to release her from all obligation to pay any part of the debt owing by the estate of J. M. Beelman, and for the further consideration of becoming sole owner of the fifteen acres of land reserved in the mortgage of her husband to Gassin, she relinquished in favor of the heirs all her community rights, as well as all others, in the tract of land aforesaid. By this act the heirs accepted the succession of their father purely and simply, and made a partition of the land, specifying the part falling to each. In pursuance of the contract entered into with their mother, the three heirs, two of them the same day, and the other in June following, executed each a note for his respective share of the original debt to Gassin, and each executed a mortgage on his separate portion of the land partitioned, as we have before seen. When suit was brought upon these notes against the several makers they seem to have made no defense against the obligations they import, but each claimed the benefit of the homestead law upon his portion of the land, alleging necessitous circumstances, and their right to claim the exemption of their lands from sale under the mortgages. Judgment was rendered in favor of the right of homestead claimed by two of the defendants, Mrs. Tinney and Alexander Beelman; the mortgages executed by them were

declared null and void, and judgments were rendered in favor of the plaintiff for the amount of the notes sued upon. From this judgment the plaintiff has appealed.

Two bills of exception appear in the record, but we do not consider it important to pass upon them in the consideration of the case.

It is strenuously argued on the part of the plaintiff, that the original mortgage to Gassin bears upon the land; that the obligations entered into by the heirs are only extensions of the original mortgage by their ancestor to Gassin; that as against that mortgage the homestead claim can not have effect. The plaintiff contends that as to Frederick M. Beelman, he can not claim the benefit of the homestead law, because at the time he executed his note and mortgage he was unmarried, and had no one dependant upon him for a support. Judgment as to him was rendered by the lower court in favor of the plaintiff, ignoring his homestead claim, from which he appealed.

The original mortgage to Gassin, executed by John M. Beelman on the twenty-eighth of March, 1861, was not reinscribed within ten years, but the plaintiff holds that the inscription of the mortgages renewing and recognizing it, before the expiration of the ten years, was equivalent to reinscription. He contends, further, that the notes sued on do not represent a debt created subsequently to 1865, the year the homestead law claimed by the defendants was enacted. On the part of the defendants it is urged that there was a novation of the original debt; that if the attempt were made to enforce the original mortgage to Gassin, the answer would be that no such mortgage exists, for the record shows that it has been erased; besides, by the assent of the creditor new mortgages, granted by different parties in 1867, have been substituted for it. The defendants herein, it seems, are not held as heirs of John M. Beelman, but rather upon conventional contracts of their own; they should then be held upon such contracts alone.

The authorities we are referred to by plaintiff's counsel, in relation to the homestead right, refer, we think, to the provisions made under the act of 1852, for indigent widows and children. The obligations sued upon were entered into in 1867, subsequent to the passage of the homestead law of 1865. We are of the opinion that there was a novation in this case. Whether the original mortgage was valid against the heirs or not, for want of reinscription, it is unnecessary to inquire. It was abandoned and became inoperative by the consent of the original mortgagee, who received in lieu thereof the new obligations which are now sought to be enforced.

With this view of the subject we think the judgment of the lower court correct, the defendants, Alexander Beelman and Mrs. Tinney, having shown that they come within the provisions of the statute

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granting homesteads. The judgment of the lower court as to these defendants is therefore affirmed with costs.

The appeal in the case of the same plaintiff against Frederick M. Beelman is not before us in this record, although incidentally referred to in our statement of the facts of this case.

Rehearing refused.

No. 5577.

LEHMAN, NEWGASS & Co., A. DUDOSSAT, subrogated v. LOUIS RANSON—On injunction of Bernard Soulié.

It appears from the mortgage certificate that the judgment of Dudossat, defendant in injunction, creates a judicial mortgage prior in rank to the judicial mortgage of plaintiff in injunction. The preference that Soulié acquired from a prior seizure of Ranson's property can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor. When sold, the property was adjudicated to Soulié, who refused to pay over the money to the sheriff, whereupon the sheriff was proceeding to resell the property when enjoined by Soulié on the ground that he had the right to retain the money in satisfaction of his judgment. This was wrong; Soulié should have complied with his bid; a *concursum* was his remedy. The sheriff was right when proceeding to resell, and the injunction was wrongfully taken.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. James D. Augustin*, for Bernard Soulié, plaintiff in injunction and appellant. *Breaux, Fenner & Hall* and *Julien Michel*, for Dudossat, defendant in injunction and appellee.

WYLY, J. In April, 1867, Bernard Soulié foreclosed, *via ordinaria*, his mortgage against Louis Ranson, and after the sale of the mortgaged property, he caused an *alias fieri facias* to issue for the balance due him on said judgment. The sheriff seized eighty acres of land in the parish of St. Charles belonging to Louis Ranson; and the same land he subsequently seized under a *fieri facias* issued by A. Dudossat, the owner of the judgment, styled *Lehman, Newgass & Co. v. Louis Ranson*. Under both these writs the property was offered for sale on the fifth July, 1873, and it was adjudicated to Bernard Soulié for \$1300. He refused, however, to pay over the money to the sheriff, and the latter was proceeding to resell the property, when he was arrested from so doing by a writ of injunction sued out by Bernard Soulié, on the ground that he was entitled to retain the price in satisfaction of his own judgment, he being the first seizing creditor, and therefore entitled to a preference over the defendant, A. Dudossat, who seized subsequently.

The court dissolved the injunction with fifty dollars damages, and the plaintiff, Bernard Soulié, appeals. The defendant, A. Dudossat, joins in the appeal, praying that the damages be increased to twenty per cent.

Lehman, Newgass & Co. v. Ranson.

It appears from the mortgage certificate that defendant's judgment styled *Lehman, Newgass & Co. v. Ranson* is a judicial mortgage prior in rank to the judicial mortgage of plaintiff against Ranson. It is evident that the preference plaintiff Soulié acquired from his prior seizure can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor.

Under the circumstances, it was the duty of the plaintiff in injunction to have complied with his bid, paying over the price to the sheriff, and then, if he thought he was entitled to the proceeds of the sale, he could in a proper proceeding have had the question settled contradictorily with all parties in interest. A *concursus* was his remedy. When he refused to comply with his bid, the sheriff was right in disregarding it and proceeding to resell the property.

The damages we will increase to one hundred dollars.

It is therefore ordered that the judgment herein be amended so as to increase the amount of damages to one hundred dollars, and as amended, it is ordered that the judgment be affirmed with costs.

Rehearing refused.

No. 5653.

A. L. GUSMAN et als. v. GUSTAVE LEBLANC, Sheriff, et als.

There is no law which requires the sheriff of a country parish to announce at a sale under a writ of *feri facias* the amount of taxes due on the property offered. The doing was mere surplusage on his part, and as it invaded no one's rights, it could cause no injury.

The fact that the bond of the adjudicatee was not given within three days after the adjudication is no ground to annul the sale in a suit instituted by the codebtors of the defendant.

That the judgment debtors, plaintiffs in this suit, have never had an offer of delivery of the surplus money or twelve months' bond for over \$530, coming to them under the adjudication made to them, is no ground to set aside the sale. It might be a ground for them to pursue the sheriff to a fulfillment of his duty.

That the act of sale allowed to a judgment creditor more than was coming to him, at the expense of the judgment debtors, is no reason for annulling the sale. The excess is something over ten dollars. This trifling error could have been corrected in the court below.

That the act of sale and return of the sheriff say nothing about interest is no reason why the sale should be annulled.

That the sheriff did not, within ten days at furthest from the adjudication, deliver or direct to the clerk of the court the original of the act of sale, the delivery having been made fourteen days after the adjudication, is no ground to annul the sale.

APPPEAL from the Fifth Judicial District Court, for the parish of East Baton Rouge. *Dewing, J. E. W. Robertson, S. P. Greves, and A. S. Herron*, for plaintiffs and appellants. *Favrot & Lamon, J. & G. W. Burgess*, for defendants and appellees.

MORGAN, J. The first ground upon which the plaintiffs rest their demand for the rescission of the sale made by the sheriff is that at both

offerings he announced that the taxes due on the property, and which were to be paid in advance of the passing of the act of sale, amounted to \$114 90, when, in truth, they only amounted to \$100 68.

Counsel for appellants say they know of no law which requires the sheriff of a country parish to announce at a sale under a writ of *feri facias* the amount of taxes due on the property offered. Neither do we. The doing so was mere surplusage on his part, and as it invaded no one's rights it could cause no injury.

The second informality urged is that the act of sale was not passed within three days after the adjudication, the sheriff having allowed the purchaser nine days in which to comply with the terms of sale.

At the time of the adjudication the adjudicatee was ill. Her bond was given as soon as she recovered. The sufficiency of the bond is not questioned. The only point raised with regard to it is that it was not given within three days after the adjudication. This is no ground to annul the sale in a suit instituted by the codebtors of the defendant.

The third ground for rescission is that the judgment debtors, who are plaintiffs and appellants in this suit, have never had an offer of delivery of the surplus money or twelve months' bond for over \$530, coming to them under the adjudication made to them. This may be a ground for them to pursue the sheriff to a fulfillment of his duty, but it is no ground to set aside the sale.

The fourth ground for rescission is that the act of sale allots to Reynaud, the judgment creditor, more than was coming to him, at the expense of the judgment debtors. The excess is something over ten dollars. This trifling error could readily have been corrected in the court below, and it is no reason for annulling the sale.

The fifth ground for rescission is that the act of sale and return of the sheriff say nothing as to interest. If there be any error in this regard it should have been corrected below. It is no reason why the sale should be annulled.

The last ground for rescission is that the sheriff did not, within ten days at furthest from the adjudication, deliver or direct to the clerk of the court the original of the act of sale, the delivery having been made fourteen days after the adjudication.

It is manifest that this as well as most of the other objections of the plaintiffs relate to mere clerical duties, and that they are none of them sufficient grounds for annulling a sale made by the sheriff when all the formalities required by the law were complied with up to and including the adjudication of the property.

Judgment affirmed.

Rehearing refused.

No. 5684.

KEIFFER BROS. et als. v. ISAAC STARN et als.

Where there is a total want of description of the situation of the thing mortgaged, the act of mortgage is invalid.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J. D. J. Wedge and T. A. Moore*, for plaintiffs and appellants. *Kernan & Lyons*, for defendants and appellees.

WYLY, J. The plaintiffs, who were judgment creditors of Philip Quitman, seized upon a lot of ground and improvements thereon in the town of Clinton, and it was sold for \$800 to the defendant, Isaac Starn, the purchaser retaining the price to pay two prior mortgages bearing on the property.

The plaintiffs complain that one of these mortgages, to wit: the one in favor of the defendant, Nathan Starn, for \$600, was simulated and fraudulent, and that it is repugnant to article 3306 of the Revised Code, and invalid because being a conventional mortgage, the act establishing it does not state precisely the nature and situation of the immovable mortgaged. They therefore bring suit to have said mortgage declared invalid and to compel the purchaser to pay over this portion of the proceeds of the sale retained by him.

The charge of simulation and fraud is not proved. The controversy is confined to the allegation that the nature and situation of the thing mortgaged are not precisely stated in the act granting the mortgage. That instrument is an act under private signature, and was recorded in the parish of East Feliciana on the seventh of August, 1873. The thing mortgaged is thus described: "All the property herein described, consisting of one house and lot, with other improvements thereon; also the half interest in the store building adjoining, with all right and title and interest of the said Philip Quitman, party of the first part."

The act mentions the nature of the immovable hypothecated, but it does not precisely state its situation, as required by article 3306 of the Revised Code. Indeed, it makes no mention whatever of the situation of the lot. Neither the State, parish, nor town where it lies is mentioned.

Here is a total want of description of the situation of the thing mortgaged, and we are constrained to hold that the act is invalid.

The cases of *Consolidated Association of Planters v. Mason*, 24 An. 518, *City National Bank v. Barrow* 21 An. 396; *Ellis v. Sims*, 2 An. 253 and *Baker v. Bank of Louisiana*, 2 An. 371, cited by defendants, all differ from the case at bar in that in those cases there was some description of the property, and sufficient, as the court held, to prevent persons dealing with the mortgagers therein from being misled or

 Keiffer Bros. et als. v. Stern et als.

prejudiced. But here the situation of the thing is not suggested at all.

It is therefore ordered that the judgment herein, maintaining the validity of the mortgage in question, be annulled; and it is decreed that the mortgage granted by Philip Quitman to Nathan Starn, described in the petition, is null and void, and the defendant, Isaac Starn, is required and commanded to pay over to plaintiffs that part of the purchase price retained by him to pay said mortgage.

It is further ordered that defendants pay costs of both courts.

No. 5472.

SUCCESSION OF G. S. DUFOSSAT et al. v. B. S. LABRANCHE et al.—
Opposition of R. BROWN et als., laborers.

The suggestion to dismiss this appeal is made under the statute No. 25, acts of 1874, but is not, in reality, supported by any one of its provisions. An appeal can not be dismissed upon a mere suggestion in argument, after the case has been taken up on its merits, without any reservation of the right to move to dismiss.

This court does not see how it is possible to recognize a privilege in favor of laborers on mules, agricultural implements, etc., sold in 1873 for work done by them on a plantation in 1872.

APPEAL from the Fourth Judicial District Court, parish of St. John the Baptist. *Flagg, J. J. D. Augustin* and *J. Reine*, for opponents and appellees. *E. Bermudez* and *Charles F. Olaiborne*, for defendants in opposition and appellants.

MORGAN, J. We take the case as stated by the counsel of the laborers, appellees: "The plantation of defendants was sold at sheriff's sale on the fifth of July, 1873, together with all the buildings and improvements thereon, and also all the mules, work oxen, and utensils serving to work the same. The plaintiffs and appellants became the adjudicatees for the sum of \$21,000 in cash, having provoked the sale by executory process on certain mortgage notes held by them. This is a contest for the proceeds withheld by the mortgage creditors, between them and the opponents and appellees, laborers on the plantation in question during the year 1872." There was judgment in their favor. Defendants appeal. In their brief, counsel for appellees ask us to dismiss the appeal because it was not made returnable according to law, and was filed too late.

The judgment was signed on the twenty-seventh May, 1874. On the same day appellants moved for a suspensive appeal returnable to the Supreme Court, on the third Monday of January, 1875, which is the return day fixed by law for appeals from that parish. The record was filed here on the fourteenth of November, 1874.

The suggestion to dismiss the appeal is made under the statute No. 25, acts of 1874, entitled "An Act relative to the trial of certain suits

in which provisional seizures have been issued," the second section of which provides that all appeals in the cases referred to in the act shall be returnable to the appellate court within three days after rendition and signing of judgments.

In the first place, no provisional seizure issued in the case under consideration. In the second place, motions to dismiss must be filed in writing before joinder in error or answer to the merits, or such preliminary objections will be considered as waived. 8 R. 168; 3 R. 169. We can not dismiss an appeal upon a mere suggestion in argument after the case has been taken up on its merits without any reservation of the right to move to dismiss.

On the merits we do not see how it is possible for us to recognize a privilege in favor of laborers on mules, agricultural implements, etc., sold in 1873 for work done by them on the plantation in 1872.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the oppositions filed by the several opponents herein be dismissed at their costs.

Rehearing refused.

No. 5611.

MRS. ISABELLA A. FLUKER v. MRS. HARRIET HERBERT. MRS. BARKDULL called in warranty.

What was never of record can not be supplied by parole. The ruling of a court upon the exclusion of evidence must be of record.

The plea of *res judicata* does not rest on the regularity of the proceedings which can be removed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J. D. C. Hardee*, for plaintiff and appellant. *Kernan & Lyons*, for defendant and appellee. *Kilbourne & McVea*, for warrantor.

HOWELL, J. This is a petitory action to recover a tract of land, which plaintiff alleges she bought at the probate sale of Nancy Stevens, in December, 1862; that she and those under whom she holds have been the lawful owners thereof for over thirty years; that Mrs. Harriet Herbert is now in possession of said land, and claims to be the owner of the same by virtue of a pretended transfer made by Mrs. L. P. Barkdull on the seventh of March, 1868; that the said Mrs. Barkdull never was the owner thereof, and she prays that she be declared the owner and put in possession of said land.

To this petition the defendant filed the plea of *res judicata*, inasmuch as the demand herein is the same, founded on the same cause of action

Mrs. Isabella A. Fluker v. Mrs. Harriet Herbert.

and between the same parties, as that which has been adjudged in suit in same court, entitled *H. H. Herbert v. the Sheriff et al., Mrs. I. A. Fluker, intervenor.*

This plea was overruled, answer was filed, and from a judgment in favor of defendant plaintiff has appealed.

The record in the said suit shows that as to the plaintiff and intervenor therein, the demand, the cause of action, and the parties were the same as in this; but the plaintiff herein offered parole proof that on the trial of the said cause the counsel for the plaintiff in injunction objected to the introduction of any evidence on the part of the intervenor on the grounds that no service had been made of said intervention, no issue joined by answer, and no evidence offered on the part of the intervenor up to said trial; to which the counsel for the defendant herein objected, on the grounds that the judicial acts of a court of record could be evidenced by the record alone, and could not be supplied by parole evidence, and that on the trial of a peremptory exception of *res judicata* no parole evidence is admissible, except to explain an ambiguity in the judgment or to establish the identity of the object.

These objections were overruled and the testimony admitted "to explain any ambiguity as to the extent of the judgment."

We think the court erred. The first ground is sustained by the case *State v. Smith*, 12 An. 349. What was never of record can not be supplied by parole. The ruling of a court upon the exclusion of evidence must be of record. There is no ambiguity or obscurity in the judgment. The jury found in favor of the plaintiff in injunction and dismissed the intervention. On this verdict judgment was rendered in the following words: "It is therefore ordered that the injunction herein sued out be perpetuated; that Harriet Herbert be recognized as the owner of the tract of land described in plaintiff's petition, and that the defendants pay costs. And it is further decreed that the intervention of I. Ann Fluker be dismissed at her costs."

From this judgment the intervenor did not appeal. The record of that suit shows that her counsel was present and took part in the taking of testimony on trial, and that his name appears in connection with that of the counsel for the defendants in the motion for an appeal by defendants. This judgment was conclusive upon the demand of the intervenor and is final. The plea of *res judicata* does not rest on the regularity of the proceedings which can be reviewed on appeal, but upon the force of the judgment pronounced upon the demand and cause of action between the parties.

Without the above parole evidence the plea must be held to be good, and the judge *a quo* erred in overruling it.

And for this reason it is ordered that the judgment appealed from, which was in favor of defendant, be affirmed with costs.

Smith & Co. v. The City of New Orleans and Recorder of Mortgages.

No. 3683.

SAM SMITH & CO. v. THE CITY OF NEW ORLEANS AND RECORDER OF MORTGAGES.

When the city of New Orleans purchases a piece of property and gives its bonds therefor, the bonds must be considered as a payment of the price, and the property thus acquired, unless the contrary be expressly stipulated, is free of all incumbrance, such as vendor's lien and privilege.

As the vender's privilege need not be stipulated in the act of sale, but results from the nature of the debt, so it need not be expressly renounced, but may be implied from the terms of the instrument. This implication must, however, be clear.

There is a wide difference between the bonds issued in the name of and payable by an important political corporation and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

Where, as in the contract of sale relied on in this instance, payment was made in bonds, it was as if the price had been paid in current money. The language of the contract and of the act itself, on which it is based, implies such an intention, and indicates that it was meant to give a full discharge of the debt, without the reservation of any lien or privilege to secure the bonds at maturity.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. A. Walker, L. E. Simonds*, for plaintiffs and appellants. *B. Waples*, for the city of New Orleans; *Hornor & Benedict*, for the Recorder of Mortgages, defendants and appellees.

MORGAN, J. For the reasons assigned by the district judge, the judgment of the district court is affirmed with costs.

REASONS OF THE JUDGE A QUO.

On the nineteenth day of January, 1869, the Commercial Bank of New Orleans sold the city of New Orleans all of the property belonging to the waterworks constructed, by said bank. This sale was made in conformity to the award of five arbitrators chosen by the bank and five by the city, in accordance with the provisions of section 42 of the act incorporating said bank, April 1, 1833.

The price was fixed at one million three hundred and ninety-three thousand four hundred dollars, payable in bonds of the city of New Orleans, running thirty years and bearing five per cent. interest.

This act of sale was made before the official notary of the city, who caused it to be recorded in the office of the register of conveyances, and also in the office of the recorder of mortgages. This last was calculated to preserve a registry of the vendor's privilege in favor of the Commercial Bank.

In May, 1870, the city of New Orleans came into this court and took proceedings against the recorder of mortgages and the Commercial Bank, to have the registry in the recorder's office canceled. The city insisted that there had been no stipulation of mortgage in the act, and that the bank, having received the bonds, was not entitled to the vendor's privilege.

There being no opposition, a judgment was rendered ordering the cancellation of the registry. This judgment was signed May 27, 1870. June 3, seven days thereafter, Sam Smith & Co., the present plaintiffs, filed a petition of intervention, setting forth the same allegations urged in the petition in this case; the intervenors being too late to have the case reopened, this direct action was brought.

The plaintiffs aver that they are holders and owners of bonds issued for payment of the waterworks as aforesaid, to the amount of seventy-five thousand, which bonds are payable to the Commercial Bank or bearer, and were purchased by petitioners with all rights thereto appertaining.

The plaintiffs further allege "that the sale of said waterworks by said Commercial Bank of New Orleans to the city of New Orleans was duly registered by the register of conveyances and recorded by the recorder of mortgages; and that, from the nature of the contract and by effect of law, the vendor's lien and privilege attached to said property in favor of the Commercial Bank and its vendees and assignees of the bonds."

This action is therefore brought against the city of New Orleans and the recorder of mortgages to enforce the reinscription of the act in the office of the recorder of mortgages, to the end that it shall operate as a record of the vendor's lien and privilege.

The city in its answer insists that the nature and terms of the contract did not preserve to the Commercial Bank the vendor's lien and privilege.

Article 3249 of the Civil Code provides that the vendor shall have a privilege on immovables sold by him, for the payment of the price, or so much of it as is unpaid, whether it was sold on or without credit.

The vendor's privilege need not be expressly stipulated. "It is a right which springs from the nature of the debt, and by force of law is embodied in the contract unless it be renounced." 3 An. 600. Although the vendor may not have stipulated a mortgage in the contract of sale for security of the balance unpaid, still the vendor's privilege remains. The vendor will still have this lien though he expressly renounce his special mortgage. 3 La. 112. The vendor's privilege confers rights superior to those which flow from a mortgage. It gives to the vendor, in addition to the right to have the property sold to pay the price, a right to the rescission of the sale on the nonpayment of the price. 3 An. 600. 12 Robinson, 279.

The vendor's lien and privilege may, however, be renounced. As the privilege need not be stipulated in the act of sale, but results from the nature of the debt, so it need not be expressly renounced, but may be implied from the terms of the instrument. 3 An. 600. This implication must, however, be clear.

The city of New Orleans insists that the Commercial Bank, having received bonds in payment of the price of the waterworks, must be considered as having renounced the privilege. In the case of *Boujeat v. Smith*, 16 O. S. 467, the court held that in a sale where mortgage notes were given in payment, the words were to be taken with reference to other parts of the act, and were not sufficient to justify the supposition that the privilege had been renounced.

If, however, from the terms of the contract of sale, it appears that the vendor actually received notes in payment of the price, and intended to release the purchaser, the debt will be considered as novated and the privilege discharged. 2 An. 175; 4 An. 543.

A careful examination of this act of sale of the waterworks satisfies me that there is clearly an implied renunciation of the vendor's privilege, or rather that the vendor's privilege did not inure from the terms of the contract. The charter of the Commercial Bank, passed in 1833, as aforesaid, provided that at any time after thirty-five years, the city should have the right to purchase the waterworks which the Bank was authorized to construct. Section 42 of the act, after determining the mode of selecting the arbitrators who were to fix the price should the city elect to buy, provides: "And the amount so agreed upon shall be payable in the bonds of the mayor, aldermen and inhabitants of New Orleans, bearing an interest of five per centum per annum, payable thereon semi-annually, and redeemable in not less than ten nor more than thirty years from the day on which said award shall be signed, and the said waterworks delivered over to said corporation of New Orleans."

This provision is referred to in the act of sale. The language is: "And the said sums payable in the bonds of the city of New Orleans." Again: "The sale is made and accepted for —, the amount agreed upon, in settlement of which," etc.

There is a wide difference between the bonds issued as these were, in the name of and payable by an important political corporation, and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

So it seems to me that, in this contract of sale where payment was made in bonds, it was as if the price had been paid in current money; the language of the act upon which the contract was based, and the act itself, implies such intention, and indicates that it was intended to give a full discharge of the debt, without the reservation of any lien or privilege to secure the payment of the bonds at maturity.

It is therefore ordered that there be judgment for the defendants, and that the plaintiffs' demand be rejected with costs.

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ON APPLICATION FOR A REHEARING.

MORGAN, J. We affirmed the judgment of the district court for the reasons assigned by the judge thereof.

A rehearing is asked for on the ground that these reasons are insufficient and unsustained by the law.

The Commercial Bank owned the waterworks of New Orleans. These works were sold to the city of New Orleans, in payment whereof the city issued its bonds. No vendor's privilege or mortgage was reserved. The act of sale was recorded. Subsequently the city took a rule upon the recorder of mortgages to show cause why the recording of the deed should not be erased. The rule was made absolute.

This action is instituted against the city to compel the reregistration of the act of sale, so as to preserve the vendor's lien and privilege in the property sold.

We are of the opinion that when the city of New Orleans purchases a piece of property and gives its bonds therefor, the bonds must be considered as a payment of the price, and the property thus acquired, unless the contrary be expressly stipulated, is free of incumbrance.

For these reasons the rehearing is refused.

No. 5649.

SUCCESSION OF MRS. MARY COLEMAN.—Opposition of I. W. ARTHUR & Co. et als. to final account.

It is contended in this case that the law only authorizes a homestead against the estate of the deceased husband or father, and not against the succession of the deceased mother. This construction of the homestead law is untenable. Such a construction would be at war with the plain meaning of the law, as well as with the obvious purposes for which it was enacted.

APPEAL from the Probate Court, parish of West Feliciana. *Haralson, J. W. W. Leake*, for opponents and appellants. *Wickliffe & Fisher*, for the administrators and heirs, appellees.

TALIAFERRO, J. The decedent left minor children in necessitous circumstances, the small succession left by her being insolvent. For the minors the benefit of the homestead act was invoked, and a small tract of land, valued at three hundred dollars—the only real estate left by the mother—was set over to them, and they were placed on the tableau and final account as privileged creditors for seven hundred dollars, to make up the one thousand dollars which is claimed for them under the law.

The opponents to the final account are all ordinary creditors. The only ground upon which they place their opposition is "that the law only authorizes a homestead against the estate of the deceased hus-

band father, and not against the succession of the deceased mother. That privileges are *stricti juris*, and the party claiming them must point to the express law which gives him such preference on account of the nature of the debt."

Judgment was rendered rejecting the opposition of I. W. Arthur & Co., the opposing creditors, and homologating the final account.

From this judgment the opponents appeal.

It is clear that the construction of the homestead law, contended for by the opponents, is untenable. Such a construction would be at war with the plain meaning of the law, as well as with the obvious purposes for which it was enacted.

There is no error in the decree of the court.

Judgment affirmed.

No. 5650.

E. J. GAY & Co. v. R. D. BOVARD—J. A. HOLMES, Third Opponent.

Privileges have effect from the date on which the act or other evidence of the debt is recorded in the parish where the property affected is situated. But to have effect against those who have acquired, not who may acquire a mortgage, it must be recorded on the day it was entered into. The limitation relates only to the effect as to mortgages existing at the date of the privilege contract, and requires that such contract shall be recorded on the day of its execution in order to have a preference over mortgages then duly inscribed.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *L. B. Claiborne*, judge *ad hoc*. *W. W. Leake*, for plaintiffs and appellants. *Yoist & Semple*, for intervenor and appellee.

HOWELL, J. This is a contest between the third opponent, having a mechanic's privilege, and the plaintiffs, who hold a mortgage claim, for the proceeds of the sugar house machinery, upon which the said privilege rests. The plaintiffs insist that the third opponent has no preference over them, because his contract was not recorded on the day on which it was made, although their mortgage was not recorded for some months after such recording.

Art. 3273 R. C. C. "Privileges are valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law."

Art. 3274. "No privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day the contract was entered into."

Gay & Co. v. Bovard.

Here is the declaration that privileges have effect from the date on which the act or other evidence of the debt is recorded in the parish where the property affected is situated; but to have effect against those who have acquired, not who may acquire a mortgage, it must be recorded on the day it was entered into.

A mortgage recorded subsequently to the recording of a privilege does not take precedence of such privilege, because the law says that each shall have effect from the day of its inscription. Articles 3273, 3329, 3342. Nor does the law say that the failure to record the privilege on the day of the contract out of which it springs, shall destroy the privilege. The limitation relates only to the effect as to mortgages existing at the date of the privilege contract, and requires that such contract shall be recorded on the day of its execution, in order to have a preference over mortgages then duly inscribed. The third opponent is entitled to the preference.

Judgment affirmed.

No. 5624.

NEW ORLEANS CANAL AND BANKING COMPANY v. THE RECORDER OF
MORTGAGES OF THE PARISH OF POINTE COUPEE et als.

As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferer, the payee thereof, was a citizen of this State and had no such right.

Where the property of one against whom judgment had been rendered appears to be subject to privileges or mortgages entitled to preference over the judgment creditor, the latter may, by a rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privileges or mortgages to show cause why they should not be erased; and the seizing creditor can not be required to resort to a direct action against persons holding such mortgages and privileges.

When the prescription that had already acquired on the mortgage note held by De Boigne was renounced, the plaintiffs were judicial mortgage creditors. That waiver renewed the debt for the person making said waiver, but it did not revive the mortgage as to plaintiffs or to their prejudice.

APPPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Heves, J. W. W. Leake, Hyams & Jonas*, for plaintiffs and appellees; *Farrar & Montgomery, Clarke, Bayne & Renshaw*, for De Boigne, defendant and appellant.

WYLY, J. On the ninth February, 1859, James Barrow bought from Wm. Mayo Gray a plantation in the parish of Pointe Coupee, and as part of the price assumed to pay five mortgage notes given by his vendor for \$1931 36 each, bearing on the property, which said mortgage

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notes were executed on twenty-eighth June, 1856, and made payable to the order of John Slidell. All of these notes were paid except one held by Baron Charles De Boigne which matured on first March, 1861.

On eleventh June, 1866, after prescription had acquired, James Barrow executed a written waiver of prescription on this note. And on sixteenth December, 1868, De Boigne recovered judgment against Barrow for the amount thereof with recognition of mortgage and vendor's privilege.

On the second April, 1866, the New Orleans Canal and Banking Company obtained judgment against Barrow for \$7000, which was duly recorded on twentieth April, 1866.

After issuing execution on their judgment, the New Orleans Canal and Banking Company took a rule on the Recorder, Wm. Mayo Gray, and Baron Charles De Boigne, to cause the erasure of the mortgage granted by Gray to Slidell and assumed by Barrow, on the ground that all the notes to secure which the mortgage had been given were paid or prescribed.

The defendant, De Boigne, sought to have the cause removed to the United States Circuit Court on the ground that he was an alien and resident of France, the amount involved, exclusive of costs, exceeding five hundred dollars. The court, however, refused the application, and he excepted to the ruling of the court.

He also excepted to this proceeding by rule, contending that plaintiff should have brought a regular action.

The court refused the exception as to the form of the suit, and finding the claim of De Boigne had prescribed before prescription was waived and all the other notes embraced in the mortgage had been paid, gave judgment for the plaintiff and ordered the Recorder to erase said mortgage.

The defendant, De Boigne, has appealed.

We think the court did not err in refusing to allow the case to be transferred to the United States Circuit Court.

The eleventh section of the Judiciary Act of 1789 vests in the circuit courts jurisdiction of civil suits at law and in equity when the matter in dispute, exclusive of costs, exceeds five hundred dollars, in three classes of cases:

First—When the United States are plaintiffs or petitioners.

Second—When an alien is a party.

Third—When the suit is between a citizen of a State where the suit is brought and a citizen of another State.

In the case of *Coal Company v. Blatchford*, 11 Wallace 174, it was held by the Supreme Court of the United States that "in controversies between citizens of different States, where the jurisdiction of the

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courts of the United States depends upon the citizenship of the parties, if there are several coplaintiffs, each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued in those courts, or the jurisdiction can not be entertained." And this doctrine has been maintained in several other cases. 18 Wal. 553; 3 Bl. C. C. 84; 4 W. C. C. 286; 4 Mc L. 363; 6 Bl. C. C. 105.

The Recorder of the parish of Pointe Coupee, who was required to erase the mortgage, was a necessary party, and he was not suable by plaintiffs in the United States Circuit Court. As this suit could not have been brought in that court for want of jurisdiction of one of the defendants, it can not, for the same reason, be transferred to that tribunal. Brightly's Federal Digest, volume 1, page 126, sections 192, 193.

Besides, De Boigne was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferrer, John Slidell, the payee thereof, was a citizen of this State, and had no such right. 16 Peters 317; 1 Story's Laws 53; 4 Cr. 46; 2 H. 214; 13 H. 183; 5 Mc L. 147; Brightly's Federal Digest, volume 2, page 50, section 23.

In regard to the exception to the form of this proceeding, we will remark that in the case of *Larthel v. Hogan et al.*, 1 An. 330, it was held that "Where the property of one against whom judgment had been rendered appears to be subject to privileges or mortgages entitled to preference over the judgment creditor, the latter may by a rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privileges or mortgages to show cause why they should not be erased; and the seizing creditor can not be required to resort to a direct action against persons holding such mortgages and privileges." And this doctrine has been frequently reaffirmed by this court. See 2 An. 649; 15 An. 334; 24 An. 256; Revised Code, articles 3379, 3166.

The court, therefore, did not err in refusing this exception.

ON THE MERITS.

It is shown that on the eleventh June, 1866, when Barrow renounced the prescription that had already acquired on the mortgage note held by De Boigne, the plaintiffs were judicial mortgage creditors. That waiver renewed the debt due by Barrow, but it did not revive the mortgage as to plaintiffs or to their prejudice. See *Grayson v. Mayo*, 2 An. 927; Succession of Kngler, 23 An. 455; Revised Code, articles 3466, 3379, 3285.

Judgment affirmed.

No. 4376.

H. J. SAMPSON v. NORMAN WHITNEY.

Plaintiff claims a certain amount of money alleged to have been loaned to defendant. The conduct of plaintiff, under the circumstances of the case, is such as not to leave it free from the suspicion that it was regulated so as to insure, under the guise of a loan, the payment of the losses of defendant in a gambling house kept by plaintiff, when the payment of said losses could not directly be enforced on account of immoral consideration and from the violation by the parties of a prohibitory law. Courts of justice are not open to litigation of this kind.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Labatt & Aroni*, for plaintiff and appellee. *Saucier & Michinard*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues for \$2150 loaned by him, as he alleges, to the defendant, who refuses to pay it. The defendant answers, in substance, that the plaintiff predicates his demand on the pretense that he paid that sum of money on the defendant's account, lost by the latter in a gambling game played in a gambling house kept by plaintiff, in which game no current money was actually exhibited or employed, but in lieu thereof pieces of bone or other similar substance were, by virtue of an understanding among the parties engaged in that game, used as the representative of money.

Defendant specially denies that he incurred any valid obligation in favor of plaintiff. He alleges that no obligation whatever can arise from the unlawful cause alleged by defendant, and that he owes plaintiff nothing. The plaintiff had judgment in the court below, and the defendant appealed.

The plaintiff is in court with but little grace. The evidence shows that he is the keeper of a house used as a place for gaming; that in his house persons engage in gambling of that kind where no current money is actually exhibited or employed, but in lieu of which pieces of bone or other material or substance is used by common consent and understanding of those engaged in such gambling as representing money; and this kind of gambling, expressly forbidden by law, the plaintiff promotes by furnishing a house for that purpose and affording the appliances necessary in such gambling, and especially the pieces of bone or other material, the conventional symbols of money among the gamblers; that at the close or ending of a game of this sort in the plaintiff's house, where the defendant's losses were heavy, the plaintiff redeemed the symbolical particles of bone or other material which he had officiously furnished the defendant with, in order to enable him to continue the game after all his own means had been lost. The payment thus made by the plaintiff to the several parties who had won from the defendant, was at best only the payment of money lost at a game prohibited by law. The plaintiff knew all the facts and circum-

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stances under which he paid the defendant's losses. He had indirectly contributed to those losses, and he should not now be heard in demanding the reimbursement of the amount on the ground that he loaned the defendant money to pay his losses at gaming. Under such a state of facts the defendant is not any more bound legally or morally to pay the plaintiff, than he is to pay the parties who won from him at the prohibited game. It is not pretended that the payment was made by request of the defendant, or at his instance in any manner. The conduct of the plaintiff, on the contrary, was such as not to leave it free from the suspicion that it was regulated so as to insure the payment of the losses of the defendant under the guise of a loan to him, when directly payment of those losses could not be enforced on account of the immoral consideration, and from the violation by the parties of a prohibitory law.

In this case we repeat what was said by this court in the case of *Whitesides v. McGrath*, 15 An. 401, similar in its character to the one at bar: "Courts of justice are not open to litigations of this kind."

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

No. 5172.

WHITE AND TOMKINS, Executors, v. LOUISIANA LEVEE COMPANY.

It is in evidence that the Louisiana Levee Company, defendant in this case, made no contract with plaintiffs, the executors of Elder, but that said executors finished the work for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment. It is immaterial whether the succession of Elder was insolvent or not, as far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound, for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Semmes & Mott*, for plaintiffs and appellees. *A. Pitot*, for defendant and appellant.

LUDELING, C. J. B. J. Elder contracted with the defendant to construct certain levees, which he proceeded to construct until he died and his executors completed the work. They sue for the whole price \$7161 60 of the work done by them.

The defendant alleged that the deceased, Elder, had been overpaid for work done under said contract prior to his death, and that the Levee Company owed only \$2749 59.

The counsel for plaintiff thereupon took judgment against the Levee

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Company for the amount confessed, without prejudice to its right to prosecute its claim for the balance of the contract price. Subsequently judgment was rendered in favor of the plaintiff for this balance.

The evidence satisfies us that the Levee Company made no contract with the executors of Elder, but that said executors finished the work, for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment, to wit: \$2749 59. It is immaterial whether the succession of Elder was insolvent or not, so far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment dismissing the plaintiffs' demand for the excess over \$2749 59, confessed by the defendant, with all costs accruing subsequent to said confession.

No. 5696.

SUCCESSION OF FRANCOIS POUSSIN—On rule of G. W. BANKER and T. C. PAYAN, to destitute the Administratrix.

An attorney at law can not allow claims which the legal representative of the succession, as in this case, never saw or heard of, much less allowed.

APPEAL from the Parish Court, parish of Rapides. *Blackman*, judge *ad hoc*. *J. G. White*, for Banker and Payan, appellees. *R. A. Hunter*, for the administratrix, appellant.

WYLY, J. In this suit, brought by G. W. Banker and Thomas C. Payan, claiming to be creditors, to destitute Mrs. C. Poussin of the administration of her husband's succession, on the ground that she has failed to perform the duties of said office, the defense is set up that they are not creditors, their claims have never been allowed by her, although without her knowledge placed by her attorney on the tableau of debts, filed and homologated in 1866, and that said claims are barred by the prescription of five years which she pleads.

The judgment of the court was, that Mrs. Poussin file an account within ten days, and in default thereof that the public administrator take possession of said succession, and she be destituted. Mrs. Poussin has appealed.

Appellees joining in the appeal, pray that the order of dismissal be made absolute in terms.

Succession of Poussin.

There are several reasons why the judgment should be reversed and the suit dismissed for want of interest on the part of plaintiffs in the proceeding:

First—Their claims have never been allowed by the administratrix as required by articles 985, 986 C. P., nor have they been established as valid debts of the succession by the judgment of a court of competent jurisdiction.

Second—The defect just stated was not cured by the fact that these claims were included, without the knowledge or consent of the administratrix, in the statement of debts which her attorney filed in 1866, and which was homologated because not opposed after advertisement. This is not the manner provided in articles 985, 986 C. P., for the allowance of claims; and an attorney at law can not allow claims which the legal representative of the succession, as in this case, never saw or heard of, much less allowed.

Third—If the claims had been allowed at the time of the filing of the tableau of debts in 1866, they would not be binding on the succession, because the proof shows they were already prescribed, and the administratrix had not the power to renounce prescription.

Fourth—If the claims had been allowed by the administratrix at the time stated, prescription has since extinguished them, the record containing no evidence of the interruption since then of the current of prescription.

As the plaintiffs in rule are not creditors of the succession, they have no interest in the matter of which they complain, and their suit must be dismissed.

It is therefore ordered that the judgment herein be annulled, and it is decreed that this proceeding be set aside and the petition be dismissed at the costs of appellees in both courts.

No. 5343.

STATE OF LOUISIANA v. WILLIAM EVANS.

The coroner's inquest being signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner who is a sworn officer, his certificate of the signatures of the jurors is sufficient.

A PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.* Criminal case. *Thomas L. Winder*, district attorney, for the State, appellee. *Tobias Gibson*, for defendant and appellant.

TALIAFERRO, J. The defendant was found guilty of the crime of murder and sentenced to hard labor in the penitentiary for life. He

has appealed. On trial of the case the district attorney offered in evidence the coroner's inquest held over the body of the deceased. It was objected to on the part of the defendant, on the ground that the signatures of the pretended jurors was not verified as the law requires, the same having been made with a cross mark, and no witnesses thereto. The objection was overruled and a bill of exceptions reserved.

The coroner's inquest was signed by the coroner, and duly certified to by him. The jurors signed by making their cross mark, and the whole was certified to by the coroner, who is a sworn officer. His certificate of the signatures of the jurors is sufficient.

Judgment affirmed.

No. 5579.

ALEXANDER LIRETTE v. JOHN CARRANE.

On the fourth of March, 1865, defendant bought from Peter Mackley the property in dispute, and was put in possession of the same. On the thirteenth day of September of the same year, Ashworth obtained a judgment against Mackley in the following words: "By reason of the law and evidence being in favor of plaintiff in the within suit, it is hereby ordered, adjudged and decreed, that plaintiff do recover judgment as prayed for."

The certificate of the recorder of mortgages shows that this judgment was recorded thus on the twenty-sixth of September, 1865: "A judicial mortgage in favor of James Ashworth v. Peter Mackley as prayed for."

On the thirtieth of October, 1865, a *feri facias* issued in the case of Ashworth v. Mackley, and the sheriff in his return states he seized the property in controversy, as the property of Mackley, and advertised and sold the same.

There is nothing in the above mentioned return, or in this record, to show that the property was ever in the possession of the sheriff. The opinion of the deputy sheriff that he seized the property is not sufficient. He should have stated facts showing how he effected the seizure. So far as the record shows, the defendant was not disturbed in his possession until after the sheriff's sale.

In the meantime, Mackley, the vendor, and Carrane, the vendee, having learned that the recorder had made an error of description in the deed of sale from the one to the other, went together before the recorder, and by a public act, which was duly recorded, corrected the mistake.

There is no force in the assertion that, inasmuch as the judgment of Ashworth against Mackley was recorded before the correction of the misdescription of the property sold to Carrane, the judicial mortgage in favor of Ashworth attached, and the correction was made too late. There was not a registry of such a judgment as could create a mortgage against the property. The judgment specified no amount, and the registry thereof gave no notice to third parties. There was no seizure and there could be no legal sale of the property, because the sheriff did not take possession.

A PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.* Jury trial. *Tobias Gibson*, for plaintiff and appellee. *James L. Belden* and *T. P. Sherburne, J. J. Foley*, for defendant and appellant.

LUDELING, C. J. This is a petitory action for two lots of ground and the buildings thereon, situated in the town of Houma. The facts proved are that on the fourth of March, 1865, the defendant bought

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from Peter Mackley the property in dispute, and was put in possession of the same.

In September, 1865, a judgment was rendered against Peter Mackley in the following words: "By reason of the law and evidence being in favor of plaintiff in the within suit, it is hereby ordered, adjudged and decreed that plaintiff do recover judgment against the defendant, Peter Mackley, as prayed for. Thus done and signed in open court, this thirteenth day of September, 1865."

The certificate of the recorder of mortgages shows that this judgment was recorded thus: "A judicial mortgage in favor of James Ashworth against Peter Mackley (as prayed for), inscribed in this office twenty-sixth September, 1865."

On the thirteenth of October, 1865, a *fieri facias* was issued in the case of Ashworth v. Mackley, and the sheriff in his return states that he seized the property as the property of Mackley, and advertised and sold the same. There is nothing in the returns, or in this record, to show that the property was ever in the possession of the sheriff. The opinion of the deputy sheriff that he seized the property is not sufficient. He should have stated facts showing how he effected the seizure. So far as the record shows, the defendant was not disturbed in his possession until after the sheriff's sale.

In the meantime, having learned that the recorder had made an error of description in the deed of sale of the lots bought by him, by stating that they were in block twenty instead of twenty-eight, Carrane, the defendant, together with the vendor, Mackley, went before the recorder and by a public act, which was duly recorded, corrected the mistake. The evidence shows conclusively that at the date of the sale to Carrane, Mackley owned no other lots in the town of Houma but lots one and two in block twenty-eight, upon which were some buildings; that lots one and two in block twenty were vacant lots, which did not belong to Mackley, and that Carrane, the vendee, was put in possession of lots one and two of block twenty-eight at the date of the sale to him.

It is pretended, however, that inasmuch as the judgment of Ashworth against Peter Mackley was recorded before the correction of the misdescription of the property sold to Carrane, the judicial mortgage in favor of Ashworth attached, and the correction was made too late. A sufficient answer to this is that there was not a registry of such a judgment as could create a mortgage against the property. We have already seen that the judgment specified no amount, and the registry thereof gave no notice to third parties. 23 An. 132; 2 An. 917.

There was no seizure of the property, because the officer did not

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take possession of the property; and therefore there could not have been a legal sale of the property. The sheriff's sale was made in December, 1865, whereas, on the fourteenth of October, 1865, the mistake in the act of sale to Carrane had been corrected, and the plaintiff had notice of the fact.

It is therefore ordered and adjudged that the judgment of the lower court be reversed and annulled, and that there be judgment in favor of the defendant against the plaintiff, decreeing him to be the owner of the property in question, and for costs in both courts.

No. 5674.

SUCCESSION OF DOMITILDE HEBERT.

Celestin LeBlanc, who gave a note in part payment of a plantation and slaves, due in February, 1862, to Jules LeBlanc, father of the minors in this instance, of whom said Celestin subsequently became the tutor, charges himself in his account with a large deduction on said note, on the ground that said note was given, in part, for the price of slaves. But slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors. Wherefore the deduction can not be allowed.

The tutor does not owe the interest claimed on the sums which came into his hands. They were not revenues, but merely a capital representing the total of the minors' inheritance, which was nearly absorbed by necessary expenses for the minors, by the payment of debts due by the successions of the minors' father and mother, and by the costs of administration. He can not be charged with interest on funds thus received.

A PPEAL from the Parish Court, parish of Iberville. *Crowell, J. W. B. Robertson, Barrow & Pope*, for appellants. *Allain & Lauve*, for opponents and appellees.

MORGAN, J. Celestin LeBlanc was appointed tutor to the minor children of Jules and Domitilde LeBlanc on the eleventh of November, 1862. He filed an account of his administration on the seventeenth August, 1871. He died tenth June, 1872. The present litigation is carried on with the representatives of his succession. Celestin LeBlanc was never appointed administrator of the successions of the father or mother of the minors. He seems to have administered upon the same as tutor.

The main opposition to the account he has presented appears to be:

First—The amount of a note given by Celestin LeBlanc to Jules LeBlanc, father of the minors, in part payment of a plantation and slaves, due in February, 1862. In his account he charges himself with \$3777 50. The face of the note was for \$7431 97. He claims a deduction as stated, on the ground that the note was given, in part, for the price of slaves. Slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors.

Second—The second objection made to his account is that the tutor charges himself with \$1650, the proceeds of fifty-five hogsheads of sugar at three cents per pound. We think the evidence shows that the sugar was worth six cents per pound. He should, therefore, have charged himself with \$3330.

Third—The important opposition to the account is the claim for interest which the opponents allege should be charged to the tutor upon all the moneys which came into his hands during his tutorship, and which he neglected to invest. The amount now claimed from him is in the neighborhood of \$16,000. The claim is founded on the 347th article of the Code, which declares that "the tutor shall be bound to invest, in the name of the minor, the revenues which exceed the expenses of his ward, whenever they amount to five hundred dollars. In default thereof, he shall be bound to pay on such excess the rate of interest allowed by law."

Revenue we understand to mean income, or annual profit received from lands or other property. If, then, the money which this tutor received had proceeded from the minors' revenues and he had not invested them according to law, there would be no question as to his liability. But it is not asserted that this is the state of facts presented by the record. The moneys received by the tutor were, in reality, the total of the minors' inheritance. With them he paid the debts due by the successions of the minors' father and mother. This indebtedness, together with the expenses of the minors and the costs of administration, amounts to very nearly the sums which he has received for their account. He can not be charged with interest on funds thus received.

The account is a very confused one, owing, no doubt, in part at least, to the circumstances which surrounded the representatives of the succession. During most of the time a state of war existed, the courts were not open, and the tutor had often to act without authority, because there was no one in authority whose advice and authorization he could procure.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended by striking therefrom the amount of interest allowed therein; that the tableau be amended by adding thereto the sum of \$3777 50, balance of amount of note given by Celestin Le Blanc to Jules LeBlanc, due in February, 1862; that \$1650 be added to the account for the sugar sold by the tutor; that the sum allowed to W. B. Robertson be reduced to \$250, and that as thus amended the judgment be affirmed, the costs to be borne by the succession.

Rehearing refused.

No. 5653.

VERNON K. STEVENSON v. LAVINIA EDWARDS et al.

This is a suit personally against a tutrix, one of the defendants, on six mortgage promissory notes given by her, and also as representing those of her children who were minors when the suit was brought, and the majors who joined in the act of mortgage, for the amount of the notes sued on, and for a decree of lien and privilege on the property mortgaged. The defendant, one of the heirs, a minor when judgment was rendered but now of age, appeals from said judgment.

The motion to dismiss defendant's appeal on the ground that all his joint obligors have not been cited and made parties to the appeal, can not prevail. He is not a joint obligor; his liability is as heir of his father, and his liability is fixed by his interest in his father's succession.

When the father of the appellant died, he was largely in debt. The representative of his succession, in order to pay off his indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness. Hence the notes now sued on. This was not the creation of a debt; it was the acknowledgment of one and providing means to pay it—all of which was done in the interest of the heirs. The appellant's liability, therefore, is fixed by his interest in his father's succession. To the extent of that interest the judgment binds him, but to nothing more.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Hays & Adams, Favrot & Lamon*, for plaintiff and appellee. *Barrow & Pope*, for David A. Barrow, defendant and appellee. *J. Fuqua*, for T. B. Edwards, defendant and appellant. *John J. Finney*, for H. L. Edwards, defendant and appellant.

MORGAN, J. In March, 1862, Mrs. Edwards, as tutrix to her then minor children, issue of her marriage with William Edwards, deceased, represented to the court of their domicile that when her husband died he left debts amounting to over sixty thousand dollars. She prayed to be allowed to mortgage the minors' interest in the succession of their father for an amount sufficient to discharge this indebtedness, and that a family meeting be convened for the purpose of giving their advice regarding her petition.

The family meeting was ordered, and, after deliberation, they recommended that the tutrix be empowered to mortgage the interest of the minors in the property belonging to the succession of their father, or any part thereof which she might see fit, and for such sum as might be necessary to discharge the indebtedness up to the amount stated in her petition.

The deliberations of the family meeting were approved, and on the seventh April, 1862, she executed several promissory notes amounting to fifty thousand dollars, to secure the payment of which, she mortgaged property belonging to the succession of her deceased husband. She was joined in the act of mortgage by Mrs. Eliza L. Edwards, wife of William A. Seay, assisted by her husband and Laura Jane Edwards, wife of John Bemiss, authorized by her husband, heirs of age

and equal in interest with the minors in the succession of their father, William Edwards.

The plaintiff owes six of the notes given by the tutrix, amounting to \$27,000, exclusive of interest.

He instituted suit against the tutrix personally, and as representing those of her children, who were minors when the suit was brought, and the majors, who joined in the act of mortgage, asking that judgment be rendered against them for the amount of the notes sued on, and that he be decreed to have a lien and privilege on the property mortgaged.

Judgment was at first rendered as prayed for on the eighteenth September, 1866, but it appearing that some of the heirs who were minors when the mortgage was created had become majors before the judgment was rendered, a new trial was granted; the heirs who had come of age were cited, and on the fifteenth May, 1867, judgment was finally rendered against all the parties to the amount of his or her liability, as heir directly or by representation in the succession of William Edwards.

H. L. Edwards, one of the heirs, a minor when the judgment was rendered, but now a major, appeals from this judgment. His right to do so, at this time, is not denied.

We are asked to dismiss his appeal upon the grounds that all the joint obligors of the appellant have not been cited and made parties to the appeal.

If the appellant was a joint obligor the motion would prevail, under the authority of 3 R. 142; 5 R. 225; 5 An. 174. But he is not a joint obligor. His liability is as heir of his father, and his liability is fixed by his interest in his father's succession. Each one of the heirs was bound for his virile portion of that debt; no judgment rendered against one of the heirs could affect either of the coheirs. Either of the heirs could have been sued for his share of the debt in a distinct suit, and neither heir could have been called upon to pay his coheir any part of the judgment rendered against him. In this view of the case the appellant's concernment is only with the plaintiff, and the only question which we will have to determine will be, was the judgment, as against the appellant, properly rendered?

When the father of the appellant died he was largely in debt. The representative of his succession, in order to pay off this indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness. Hence the notes now sued on. This was not the creation of a debt. It was the acknowledgment of one, and providing means to pay it; all of which was done in the interest of the heirs.

Counsel for appellant contends that if the minors are bound at all upon these notes, it is a qualified and limited liability, extending only to the value of the succession property. This is true. And he says that "any judgment which goes beyond, as in this instance, and condemns the minors absolutely for the full amount of the notes, is contrary to law, and should be reversed." If this were the fact, the judgment would, in part, at least, be erroneous. But we do not so read it. The judgment is "against each of the above named defendants to the amount of his liability as heir to the parties aforesaid." The appellant's liability, therefore, is fixed by his interest in his father's succession. To the extent of that interest the judgment binds him, but to nothing more.

Judgment affirmed.

No. 5614.

CHARLES HOFFMAN v. J. O. HOWELL and I. F. RILEY.

The judgment having been rendered by default and no notice of judgment having been given when the appeal was taken, it was therefore in time.

The bond of appeal was given for the amount fixed to cover costs and in favor of the person who is clerk. This is sufficient.

The plea of prescription having been filed in this court and the appellee having asked that the case be remanded to show an interruption of prescription, under the law this must be done.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. W. P. Kernan*, for plaintiff and appellee. *D. O. Hardee, Cross & Pipkins*, for defendant and appellant.

LUDELING, C. J. A motion to dismiss this appeal is based on the grounds that the appeal was not taken within one year after the judgment was signed, and that the bond of appeal, though made in favor of the person who is clerk of the court, does not state that he is clerk of the court.

The judgment was rendered on default, and no notice of judgment had been given when the appeal was taken. It was therefore in time. *Taylor v. Woodward*, 25 An. 212.

Neither is there any force in the second objection—the bond was given for the amount fixed to cover costs and is in favor of the person who is clerk.

The plea of prescription was filed in this court, and the appellee has asked that the case be remanded to show an interruption of prescription. Under the law this must be done.

It is therefore ordered that this case be remanded to the court *a qua* to give the plaintiff opportunity to prove an interruption of prescription.

Mr. Justice HOWELL was recused.

Madison v. Dyer.

No. 5627.

JAMES MADISON v. JAMES DYER.

In this controversy for the office of coroner, under section 1419 of the Revised Statutes, the exception that the suit was not brought within ten days after the election must prevail.

A PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.* Jury trial. *Charles W. Du Roy, Goode & Winder*, for plaintiff and appellee. *John Ray*, for defendant and appellant.

WYLY, J. This is a controversy for the office of coroner, under section 1419 of the Revised Statutes. The exception that the suit was not brought within ten days after the election must prevail. For the reasons stated in the following case of *Belden v. Sherburne*, the judgment herein in favor of plaintiff must be annulled and the suit dismissed.

It is therefore ordered that the judgment herein be annulled, and it is decreed that this suit be dismissed at plaintiff's costs in both courts.

No. 5625.

J. L. BELDEN v. THOMAS P. SHERBURNE.

Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within that delay, or the action, if excepted to, will be dismissed. In this instance the suit should have been brought *within ten days after the election*. The court below erred in not maintaining the exception of the defendant on that ground. The law is not ambiguous, and no room is left to the discretion or equity powers of this court; it must, therefore, be administered as it is, however unwise some of its provisions must appear.

A PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.* Jury trial. *Winder & Du Roy*, for plaintiff and appellee. *John Ray*, for defendant and appellant.

WYLY, J. This is a controversy for the office of Parish Judge. The suit was brought under section 1419 of the Revised Statutes, which provides that "Any candidate for either of the offices of clerk of the district court, parish recorder, sheriff, coroner, justice of the peace, and any other parish officer that may be elected by the people, intending to contest an election, shall, *within ten days after the election*, file in the district court for the parish in which the election may have been held a petition setting forth the facts on which he intends to contest the election."

The court gave judgment for the plaintiff, and the defendant appeals. We think the court erred in not maintaining the exception of the defendant, that the action is barred, because it was not instituted within ten days after the election, as prescribed by the statute.

The election was held on second November, 1874, and this suit was not filed till thirtieth day of December following.

Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within this delay or the action, if excepted to, will be dismissed. The act does not fix the period within ten days after the State Returning Board shall have finished the canvass; it says the suit must be brought "*within ten days after the election.*" Here the suit was not filed until nearly sixty days after the election.

The argument urged to maintain the suit, notwithstanding the exception, would be entitled to great weight if the question was within the discretion or equity powers of the court, or if the law was ambiguous; but there is no room for construction here; the statute in precise terms limits the period within which such suits shall be instituted; and the court must administer the law as it is, however unwise some of its provisions may appear.

In *Deslonde v. Lozano*, 22 An. 794, this court held that an action to contest an election for parish officers must be brought within ten days after the date of the election, otherwise the suit will be dismissed. This decision, as well as the express terms of the statute, must dispose of the case at bar.

It is therefore ordered that the judgment herein be annulled, and that this suit be dismissed at plaintiff's costs in both courts.

No. 5721.

STATE ex rel. W. VAN NORDEN v. JUDGE OF THE FIFTH DISTRICT COURT, PARISH OF ORLEANS.

When the suspensive appeal bond was signed by Cox as agent for Palmer, if he had no authority to bind Palmer, he certainly bound himself, and it is not shown that he is not solvent and good as a surety for the amount of the bond. Palmer has subsequently ratified his action in express terms. Therefore appellee has not been without a surety personally good and sufficient to protect his interest pending the appeal. He has no cause to complain, and the judge *a quo* erred in setting aside the appeal.

APPPLICATION for a writ of prohibition against the Judge of the Fifth District Court, parish of Orleans. *Rice & Whitaker*, for relator. *Huntington*, for respondent.

WYLY, J. In the case of *Henry Legendre v. W. Van Norden et al.*, the defendants obtained an order of appeal, and on the fifteenth of February, 1875, filed a suspensive appeal bond, E. C. Palmer, p. p. M. S. Cox, signing as security. The authority of Cox to sign the bond for Palmer was questioned in a rule to set aside the appeal for want of a proper surety on the appeal bond. Thereupon Palmer filed the follow-

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ing affidavit: "My name is signed to the bond of appeal in this case by M. S. Cox. He holds my general and special power of attorney, though it may not cover the right to sign for me as surety. I, however, ratify and confirm his action in the premises, and adopt the signature of my name made by him, as if made by me. I had myself already signed a like bond to be filed in this suit, which had been mislaid, and I was absent from the State when it became necessary from lapse of time that the bond should be filed."

The court maintained the rule and set aside the appeal. Thereupon appellants sought and obtained from this court the prohibition by which the ruling of the district judge is now brought up for review.

We think the judge erred. The bond was signed by M. S. Cox, as agent for E. C. Palmer. If he had no authority to bind Palmer he certainly bound himself, and it is not shown that he is not solvent and good as a surety for the amount of the bond, which is forty-four hundred dollars. He now incurs this responsibility no longer, because Palmer has, in express terms, ratified his action in the premises.

Appellee in the case stated, has not, therefore, been without a surety presumably good and sufficient to protect his interest pending the appeal; he has no cause to complain.

It is therefore ordered that the prohibition herein be made perpetual, Henry Legendre paying costs of this proceeding.

No. 4079.

HENRY BIDWELL v. C. CAVAROC and THE BANK OF NEW ORLEANS.

In this suit for damages for slander of title, Cavaroc filed a general denial; the bank, for answer, asserted title in itself, and by this answer the bank changed the suit into a petitory action in which it became plaintiff. Therefore it must succeed or fail on the strength of its own title. To this answer plaintiff pleaded the prescription of ten and thirty years.

The bank has failed to prove a valid title in its favor. But if the bank had shown that it had acquired a valid title at the marshal's sale, on which it relies, the plaintiff has acquired a valid title since then by prescription.

The plaintiff held possession since June, 1859, under titles translatif of property and apparently good, till the institution of this suit in July, 1870. More than ten years had elapsed from the commencement of possession, and there is nothing in the record to show that it was not in good faith. Therefore the plea of prescription must be maintained.

APPPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Koontz & Elliott, Randolph, Singleton & Browne*, for plaintiff and appellant. *Albert Voorhies*, for defendant and appellee.

LUDELING, C. J. The plaintiff sued the defendants for damages for slander of title. The bank for answer asserted title in itself, and Cavaroc filed a general denial.

By this answer the bank changed the suit into a petitory action, in which it became plaintiff, and it must succeed or fail on the strength of its own title. To this answer (or petition) Bidwell pleaded the prescription of ten and thirty years.

The record shows that in 1804 the Widow Collet owned the property in question. In that year she parted with her title; and it is contended by the bank that this case must be determined by deciding who was the transferee of the Widow Collet—Jean Maserat, or his wife, Marie Savant—as the adverse titles presented are claimed to be derived from them

This position of the bank is not correct, as it assumes that it holds a title derived from one of those parties, which is not admitted or proved, and it further assumes that a title by prescription has not been acquired.

The bank acquired its title at a probate sale of the estate of Christoval Toledano, on the seventh of May, 1870. C. Toledano, it is alleged, acquired from Lucien Herman, assignee of Holmes & Mills, bankrupts, at public sale by the United States Marshal, on the twentieth June, 1842. Holmes & Mills bought from the heirs of Marie Savant, on the ninth of June, 1835. The heirs of Marie Savant were put in possession of the property by a judgment of court in the suit of Widow Maserat (Marie Savant) v. J. A. Mascey, tutor et al. Mascey was tutor of his child, Rosalie Matilde, to whom the property had been bequeathed by her grandmother in June, 1822. The title under which the minor held was an unbroken chain from twenty-fifth November, 1805, and under the judgment just mentioned the minor was dispossessed in 1835. In 1842 the said judgment was declared null and void for want of citation, and the said Rosalie Matilde Mascey was put in possession under a judgment of a court of competent jurisdiction, on the fifteenth June, 1842, a few days before the property was adjudicated by Herman, assignee, to Christoval Toledano.

Rosalie Matilde Mascey retained possession until eighteenth June, 1859, when she sold to Mrs. Belknap. Mrs. Belknap sold to one Sylvester, who sold to the plaintiff Bidwell.

Possession was never given to Toledano, and so far as this record shows, he never made an effort to get possession of the property; and in November, 1846, four years after the alleged sale to Toledano by the assignee of Holmes & Mills, the said assignee sued Matilde Rosalie Mascey for this property, claiming that it belonged then to the estate of said bankrupts, and that she was preventing him from selling the property for the benefit of the creditors. This suit was dismissed on technical grounds; it is referred to only to show that long after the pretended sale to Toledano, his alleged vendor claimed the property

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as that of the estate represented by him. Even if the parol evidence that the price paid by Toledano had been returned by the assignee, because he could not deliver the property to Toledano, be disregarded, still we are convinced by the following facts that the title to him was never completed: The judgment under which Marie Rosalie Mascey was dispossessed in 1835, was annulled in 1842, and she was restored to her possession just before the marshal's sale to Toledano. Toledano, the adjudicatee at that sale, was never put in possession of the property, and although he lived in the place where the property is situated, more than twenty years after the alleged sale to him, he never made an effort to get possession of the property, or to assert title to it, and about four years after the alleged sale, the assignee Herman, his vendor, sued for the property as already stated.

We think that the bank has failed to prove a valid title in its favor. But if the bank had shown that it had acquired a valid title at the marshal's sale, the plaintiff has acquired a valid title since then by prescription.

It appears that in June, 1859, Marie R. Mascey sold this property to Mrs. Belknap, and Mrs. Belknap and her vendees held possession under titles translatif of property and apparently good, till the institution of this suit in July, 1870. More than ten years had elapsed from the commencement of Mrs. Belknap's possession, and there is nothing in the record to show that she and her vendees were not possessors in good faith. The plea of prescription should be maintained.

It is therefore ordered and adjudged that the judgment of the lower court be reversed and annulled, and that there be judgment in favor of Henry Bidwell, decreeing him to be the owner of the property described in the petition, and for costs.

No. 4121.

JOHN WOLF v. THE CITY OF NEW ORLEANS.

All actions against the city of New Orleans, for work or labor done, either under a contract or for damages, or extra work, are prescribed unless commenced in one year from the time such work is required to be performed, or such damages are alleged to have arisen.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard*, J. Jury trial. *Leovy & Monroe*, for plaintiff and appellee. *B. F. Jonas*, city attorney, for defendant and appellant.

TALIAFERRO, J. The plaintiff entered into a written contract with the city for digging, widening, deepening and cleaning the draining canal known as St. Anthony's canal, from Josephine to Humanity streets, according to the following specifications:

The canal to be dug so as to have a width of fifteen feet at the top and three feet at its bottom, and a depth of six feet. The testimony

shows that after considerable progress had been made in the execution of the work, Surgi, then city surveyor, staked off that part of the canal extending from Marigny canal to the specified limit of the plaintiff's work, so as to give the St. Anthony's canal, from the Marigny canal, a width of twenty feet instead of fifteen, specified in the contract. The plaintiff swears that he was induced to do the additional work required to give the canal twenty feet of width from Marigny canal, upon the assurance of Surgi that he would be paid for it. The plaintiff performed the additional work indicated by Surgi, but received payment only for the quantity of work specified in the contract. He applied afterwards by petition to the City Council, after the death of Surgi, to be paid for the additional labor, but his claim was finally rejected. He thereupon brought this suit claiming \$892 50, with interest, as the value of the extra work. The city avers payment in full to the plaintiff of the cost of the work contracted for, denies that any authority was given to any person to contract on the part of the city for extra work on the canal, and denies that the city surveyor had any power or right to alter the contract and specifications. In an amended answer the prescription of one year is pleaded in bar of the plaintiff's action.

The judgment of the court below, rendered on the verdict of a jury, was in favor of the plaintiff for the amount claimed, and defendant has appealed.

It is clear the plaintiff has not established any legal liability upon the city to pay his demand. If, however, any ever had existed it is now released by the effect of prescription.

"All actions for the enforcement of any contract entered into with the corporation of the city of New Orleans for work and labor to be performed, and for the recovery of any damages alleged to have arisen in favor of the contractors for any breach thereof on the part of the said corporation, shall be prescribed if not instituted within one year after the expiration of the time within which such contract is required to be performed, or such damages are alleged to have arisen." Revised Statutes, section 2822.

By the contract under which the city was bound, the plaintiff was obligated to commence the work ten days after the approval by the City Council of the adjudication of the contract to him. The approval of the adjudication by the City Council was made on the twenty-fourth of April, 1869. Citation was served on the defendant in the present action on the third day of December, 1870, more than eighteen months having intervened.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff paying costs in both courts.

Callender v. Golsan Brothers.

No. 5307.

**R. K. CALLENDER v. GOLSAN BROTHERS. JACKSON & MANSON,
Warrantors and Interveners.**

At the time of the discount of the note, which is the subject of the present controversy, Hunter, one of the firm of Callender & Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender, the plaintiff, and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender. If Callender had given him verbal authority, as contended by defendants and intervenors, the authority was revoked before exercised. But, even without a revocation, Hunter had no authority to indorse and discount the note in question.

Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees acquired none, because they had notice of the want of authority in Hunter to indorse and negotiate it.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. H. N. Ogden*, for plaintiff and appellee. *T. Gilmore & Sons*, for intervenors and appellants. *Clark, Bayne & Renshaw*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sues the defendants on a promissory note for the sum of \$774 34. The intervenors claim to be the owners of the note and oppose the payment of it to the plaintiff. There was judgment in the court below in favor of the plaintiff and the intervenors have appealed. The defendants appear to be mere stakeholders in the controversy. Callender & Hunter were commercial partners doing business in New Orleans. Golsan Brothers in some transaction with Callender, not in any manner connected with the partnership business of Hunter & Callender, became indebted to Callender individually, and gave him two promissory notes each for the above sum; one of the notes fell due twelfth January, 1873, and the other on the twelfth July following. The firm of Hunter & Callender, it appears, was pressed for money during the latter part of the year 1872, and both members of the firm being in England about that time, Callender according to his statement, instructed Hunter, who preceded him a short time in returning to New Orleans, to negotiate one of the notes (the one to become due on the first of January) and apply the proceeds to partnership purposes. Hunter negotiated both the notes to the intervenors. He states in his testimony that he was authorized to sell both the notes. The authorization to sell was verbal. On the return of Callender to New Orleans, finding the notes were both negotiated to Jackson & Manson the intervenors, he notified Golsan Brothers not to pay the note last falling due, the one sued upon, to Jackson & Manson, claiming the ownership of the note himself. Golsan Brothers deposited the amount of the note in the Hibernia Bank when it became due for the benefit of the party legally entitled to it. The intervenors

assume the position of holders for value before maturity, and without notice of equity between prior parties. Some evidence was introduced for the purpose of showing that the note was not acquired *bona fide* by the intervenors. A witness stated that he heard a conversation in Hunter's office between Hunter and Jackson, one of the intervenors, in which Hunter expressed an apprehension that Callender would sue him for a note, that Jackson said "let him sue, we can keep him out of it for four years."

It seems that the partnership between Hunter and Callender was dissolved in January, 1873, and that the note was passed off after the dissolution. The notes appear to have been indorsed with the firm name.

Under the state of facts presented, and the contradictory character of the testimony, we are unable to conclude that the intervenors do not occupy the position they claim, and that they should not be protected.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered and adjudged that the intervenors be and they are hereby recognized as the legal and proper owners of the proceeds of the note sued upon, and that the same be paid over to them. It is further ordered that the plaintiff's claim be rejected, and that he pay costs in both courts.

Mr. Justice Wily was absent and took no part in this decision.

ON REHEARING.

WYLY, J. In September, 1872, R. K. Callender, who had two notes made by Golsan Brothers, for some seven hundred and seventy dollars each, payable to his own order, in the cash box of his partner Adam Hunter, gave the latter verbal authority, as he testifies, to indorse and collect the first note, payable twelfth January, 1873, but not the second, payable in July of the same year, and apply the proceeds to the payment of a certain draft drawn from Liverpool where both the partners then were, on the firm of Hunter & Callender at New Orleans, Louisiana.

Hunter testifies that the verbal authority embraced the right to discount both of the notes for the purpose of providing funds, if necessary, to meet the time draft referred to. He, however, found means otherwise, and did not dispose of the notes of Callender for the purpose of providing funds to meet the payment of the Liverpool draft. Subsequently, to wit, early in January, 1873, a few days before the first note fell due, he discounted it with Jackson & Manson and put

Callender v. Golsan Brothers.

the proceeds to the credit of Callender on the books of Hunter & Callender, indorsing said note as follows: "R. K. Callender, per Adam Hunter, Hunter & Callender."

Callender returned from Liverpool about this time and made no objection to the indorsement and discount of the note. Subsequently the partnership of Hunter & Callender was dissolved and the partners quarreled, Hunter refusing to return to Callender the second note, maturing in July, 1873, when it was demanded by the latter.

Afterward, to wit, on twenty-seventh June, 1873, a few days before the maturity of the last note, Hunter discounted it with Jackson & Manson who knew of the dissolution of the partnership, the indorsement being the same as that written on the first note.

At the time of the discount of this note, Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender.

If Callender had given him verbal authority in Liverpool in September, 1872, as contended by the defendants and intervenors, the authority was revoked beyond doubt, before it was exercised. But from the evidence we are satisfied, without a revocation, Hunter had no authority to indorse and discount the note in question.

Take his own testimony in regard to the authority to indorse and discount this note, which is flatly contradicted by the evidence of Callender, and it only shows this power was given, if necessary, to provide funds to meet the Liverpool draft, which the firm of Hunter & Callender succeeded in providing for without the discount of Callender's notes. Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees Jackson & Manson, acquired none, because when they discounted the note payable to the order of R. K. Callender without his indorsement, and on the indorsement of Adam Hunter, they were charged with notice of his want of authority to indorse and negotiate said note.

The fact that Callender had ratified the indorsement and discount of the first note, imposed no obligation on Callender to ratify the indorsement and discount of the second note, especially as his relations as partner with Hunter had ceased, to the knowledge of Jackson & Manson.

It is therefore ordered that our former judgment be set aside, and it is decreed that the judgment appealed from be affirmed with costs.

 Mrs. L. P. Commagere v. Brown.

No. 4330.

MRS. L. P. COMMAGERE v. WILLIAM BROWN.

There is certainly nothing immoral in renting property to be used as a club room, and if it was converted into a gambling house, this is no reason why the lessee should not be bound by his contract, when there is no evidence that the lessor knew that the object for which the rooms were to be employed was different from the one mentioned in the written lease.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Charles Louque*, for plaintiff and appellant. *T. S. McCay*, for defendant and appellee.

MORGAN, J. Plaintiff sues on a contract of lease.

The answer is that the property was leased as a gambling house, and therefore the contract is an immoral one and can not be enforced.

The lease is in writing and recites that the property rented is to be used as a club room. There is no evidence that the plaintiff knew the object to which the rooms were to be employed other than what appears in the lease, although there is some testimony as to what her agent, who made the negotiations, knew about it. There is certainly nothing immoral in renting property to be used as a club room.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the plaintiff, as prayed for in her petition, with the landlord's lien and privilege on the property seized, appellant to pay costs.

 No. 4409.

A. W. WALKER v. C. S. SAUVINET, Sheriff, et als.

The motion to dismiss the appeal on the ground that there was no order of appeal came too late, said motion having been filed more than three days after the transcript was filed. The plea that the plaintiff is estopped from contesting the validity of the sale because he appointed an appraiser of the property sold is valid. He can not be permitted to avoid the responsibility of that act by stating that he did it under protest.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. T. & J. Ellis, E. K. Washington*, for plaintiff and appellant. *E. Bermudez*, for James Welsh, defendant and appellee. *E. Filleul*, for Sauvinet, defendant and appellee. *Hornor & Benedict*, for Southworth, recorder of mortgages, defendant and appellee.

LUDELING, C. J. The plaintiff sues to annul a sale of his property made under an order of seizure and sale against him, on various technical grounds.

The defendants filed an exception, alleging that the petition showed no cause of action, and that the plaintiff is estopped from contesting

Walker v. Sauvinet, Sheriff, et als.

the validity of the sale because he appointed an appraiser of the property sold; that he was in the parish and did not oppose the sale, and that he ratified the sale by authorizing his wife to claim the proceeds of the sale.

There was judgment in favor of the defendant, dismissing the suit, and plaintiff has appealed.

A motion has been made to dismiss the appeal on the ground that there is no order of appeal. The motion was filed more than three days after the transcript was filed. It came too late. 2 An. 138; 11 An. 613.

The plaintiff, when notifying the sheriff whom he had appointed as an appraiser of the property, stated that he made the appointment under protest, alleging that there were informalities in the proceedings. We do not think he can thus avoid the responsibility of his act of appointing an appraiser.

We think the judgment of the lower court correct.

It is therefore ordered that the judgment be affirmed with costs of appeal.

No. 5686.

SCHMIDT & ZEIGLER v. MRS. LOUISE B. WILLISTON et al. ALEXANDER THOMPSON, third opponent.

The ruling of the judge *a quo* permitting the husband of the defendant to testify in regard to the ownership of the property claimed by the third opponent, was correct. As between the third opponent and plaintiffs he was a competent witness, because the wife was not a contestant in that controversy.

The judge *a quo* did not err when refusing to allow a witness to state his opinions or conclusions as to the effect had in giving defendant credit by placing the mules in controversy on her plantation.

The objection by the seizing creditors that the third opposition was not made in time, as it was not served on them until after the sale, is not well founded under the circumstances of the case as exhibited by the evidence on record.

APPEAL from the Fifth Judicial District Court, parish of Iberville. James L. Cole, parish judge, acting for the district judge, recused. Samuel Matthews and James H. Grover, for plaintiffs and appellants. A. & E. Talbot and Barrow & Pope, for third opponent and appellee.

LUDELING. C. J. Smith & Zeigler obtained an order of seizure and sale of the plantation of the defendant, and caused the plantation, with all the farming implements, mules, etc., to be seized and advertised. Alex. Thompson intervened, and claimed that fourteen mules, one cow, carts, plows, etc., belonged to him, and he prayed for the property or its value, which he alleged to be worth \$1650, and for fifty dollars per month, the value of the use of said property, during the time he was deprived of it. He subsequently amended his petition

Schmidt & Zeigler v. Mrs. Louise B. Williston et al.

alleging that the property was worth \$2650. There was judgment for the third opponent for \$2295 63, with legal interest from date of judgment, unless the property were restored within thirty days from the rendition of the judgment. The plaintiff has appealed.

There are two bills of exceptions in the record. One to the ruling of the judge permitting the husband of the defendant to testify in regard to the ownership of the property claimed by the third opponent. As between the third opponent and the plaintiff, he was a competent witness, and the wife was not a contestant in that controversy.

The other bill of exceptions was to the refusal of the judge to allow a witness to state his opinions or conclusions as to the effect placing the mules in controversy on the plantation had in giving defendant credit.

We think the ruling of the judge *a quo* correct. Besides, the debt of the plaintiff was created before the mules, etc., were placed on said plantation.

Schmidt & Zeigler, seizing creditors, say that the third opposition was not in time, as it was not served on them till after the sale. The record shows that the petition was filed before the sale, and served on the sheriff. The seizing creditors resided in New Orleans; hence the delay in making the service. But it appears that one of the creditors was at the sale and was notified of the claim of the third opponent.

The judgment of the lower court is correct under the evidence in the record, which is not contradicted.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 5669.

BUSKEY & Co. v. J. A. ROTHSCHILD.

This court can not sustain the bill of exceptions taken to the ruling of the judge *a quo*, permitting the plaintiff to amend his petition by correcting the allegation in regard to the dates of the notes sued on, on the ground that it came too late, as the trial had commenced. Amendments should always be allowed when justice would be subserved thereby. If the defendant was taken by surprise, he might have obtained a continuance on that ground.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & W. Farrar* and *H. R. Steele*, for plaintiffs and appellees. *Seale & Morrison*, for defendant and appellant.

LUDELING, C. J. The plaintiff sued the defendant on two promissory notes and obtained an attachment against his property. The attachment was dissolved. On appeal that judgment was affirmed.

Afterward, the case was tried on the merits, and the defendant having prayed for damages in reconvention, there was judgment in favor of the plaintiff for the sum due on the notes and in favor of the defendant on his reconventional demand. The defendant has appealed.

A bill of exceptions was taken to the ruling of the judge permitting the plaintiff to amend his petition by correcting the allegation in regard to the dates of the notes sued on, on the ground that it came too late, as the trial had commenced. Amendments should always be allowed, when justice would be subserved thereby. If the defendant was taken by surprise thereby, which is not probable, he might have obtained a continuance on that ground.

The evidence supports the judgment of the lower court.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 5587.

CHARLES E. ALTER v. JAMES E. ZUNTS.

Parol and written evidence in this case shows that defendant's obligation was that of surety, for when one "accedes to the existing obligation of another, and engages to see it performed, he becomes essentially a surety."

It is the essence rather than the form of a contract which must determine its character.

"Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not."

Such seems to have been the obligation assumed by defendant. The renewal of the note without the consent of the surety, discharges him.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. M. M. Cohen*, for plaintiff and appellee. *E. H. McCaleb*, for defendant and appellant.

LUDELING, C. J. This suit is brought to recover the sum of \$2528 75, interest, attorney's fees, and costs, being the balance due on a mortgage note for \$5000 drawn by Charles A. Weed to his own order and by him indorsed in blank. The name of the defendant is not on the note, but he signed the act of mortgage executed by C. A. Weed in favor of the holder or bearer of the note. The act of mortgage contained the following stipulation: "And now personally intervened in these presents, Mr. James E. Zunts, of this city, who, after having taken cognizance of the foregoing act of mortgage, *declared that he does hereby bind himself jointly and in solido with said C. A. Weed for the payment of the aforesaid note for five thousand dollars, at its maturity, in favor of L. F. Generes or any future holder of the same.*"

The defense is that Zunts bound himself as surety, and that he was released by the prolongation of the term of payment of the note, without his consent. The evidence leaves no doubt that the term of

payment was prolonged for a valuable consideration and without the consent of Zunts.

The only question is, did Zunts bind himself as *surety* or as a principal?

The parol evidence in this record (received without objection) would remove any doubt on that point, if the written act itself were ambiguous. Generes and Weed as well as Zunts testified in substance that J. E. Zunts signed the act of mortgage as a surety or guarantor for Weed, who was borrowing the five thousand dollars from Generes, a broker. But without this testimony, we think the written act shows that Zunts' obligation was that of surety, for when one "accedes to the existing obligation of another and engages to see it performed he becomes essentially a surety." It is the essence rather than the form of a contract which must determine its character. "Suretyship is an *accessory* promise by which a person *binds himself* for *another already bound*, and agrees with the creditor to satisfy the obligation, if the debtor does not." C. C. 3135; 14 La. 509. Such, from the written act, appears to have been the obligations assumed by J. E. Zunts.

The renewal of the note without the consent of the surety discharged him. C. C. 3063.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant against the plaintiff, rejecting his demands with costs.

No. 4093.

NEW ORLEANS, FLORIDA, AND HAVANA STEAMSHIP COMPANY v. E. B. BRIGGS.

The amount due for unpaid stock must be paid. It is no defense to allege that the penalty for not paying said amount is the forfeiture of the stock.

APPEAL from the Fourth District Court, parish of Orleans. *Theard*, J. Jury trial. *Leovy & Monroe*, for plaintiffs and appellants. *Randolph, Singleton, & Browne*, for defendant and appellee.

MORGAN, J. Plaintiff seeks to recover from the defendant an amount due by him for unpaid stock.

The defense is that the penalty for not paying the amount due is the forfeiture of the stock.

The agreement to pay was an obligation on the part of the defendant, and we think the plaintiff has the right to enforce it.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside, and that there be judgment in favor of the plaintiff for seven hundred and fifty dollars with legal interest thereon.

Flagg v. The Parish of St. Charles.

No. 5566.

O. J. FLAGG v. THE PARISH OF ST. CHARLES.

Tax payers have a right to appeal from a judgment rendered against the parish, and in which a special tax is decreed.

A bare inspection of the record was sufficient to indicate an appeal as the course for the district attorney *pro tem.* to pursue, in view of his duty as an officer protecting the legal rights of his client, the parish of St. Charles. He took no appeal, however, and when the tax payers of said parish sought to exercise that right, not content with his own inaction, he joined the plaintiff in an effort to defeat the appeal, to the prejudice of his client, the parish of St. Charles. This is an extraordinary feature; the conduct of that public officer is reprehensible.

There is no proof in the record that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury.

If the warrants or certificates were authorized to be issued, they are not sufficient to justify the judgment of the court below. Police juries, in the administration of the limited powers confided to them, must provide means by taxation for the purpose and in the manner provided by law. They can not bind the parishes by putting in circulation their notes or warrants at pleasure.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Durapau*, parish judge, acting in the place of the district judge, interested and recused. *O. J. Flagg*, in *propria persona*. *M. Marks*, *F. B. Earhart* and *J. D. Augustin*, for said plaintiff and appellee. *Breaux*, *Fenner & Hall*, for defendants and appellants.

WILY, J. O. J. Flagg, who is the Judge of the Fourth Judicial District, brought this suit against the parish of St. Charles, on numerous warrants or evidences of debt issued by the president of the police jury or by the secretary of that body, amounting in the aggregate to seven thousand and four dollars and ninety-nine cents, claiming that the same were transferred to him for a valuable consideration, and offering in evidence a list of said claims together with said warrants or evidences of indebtedness, he obtained judgment by default against the parish of St. Charles for the full amount demanded; the parish judge presiding instead of the plaintiff, the district judge, who appeared to prosecute his own suit.

No other proof was adduced in support of the demand.

The defendant, the parish of St. Charles, made no defense and took no appeal.

S. N. Burbank, tutor, William B. Whitehead, Lesassier & Binder, Robert Patterson, O. B. Graham & Cuny, A. Rochereau, the Citizens' Bank, and thirteen other tax payers in said parish, alleging under oath that their pecuniary interest in the matter in dispute largely exceeds five hundred dollars, and they are aggrieved, have taken an appeal from said judgment.

The plaintiff moves to dismiss the appeal on several grounds, the most important being that in their petition and affidavit they show no cause for the appeal.

We think otherwise. Appellants, as tax payers, will have to contri-

bute to pay the judgment of which they complain, a special tax being ordered in the decree, and their interest, they swear, exceeds five hundred dollars. If the tax payers of the parish, who will have to pay the judgment if it is put in force, have no interest to have it reversed on appeal because erroneous, it is difficult to imagine who has. As a legal entity the parish can not suffer by an unjust judgment; it is the people thereof or the tax payers who will feel the burden. C. P. 571; 22 An. 602; 23 An. 582, 678; 25 An. 627.

An extraordinary feature of the case is presented in the motion to dismiss the appeal filed by N. S. Martin, district attorney *pro tem.* in behalf of the parish, the defendant, who is condemned to pay \$7004 99.

Why he should be anxious to join the plaintiff, the district judge, and defeat the appeal, to the prejudice of his client, the parish, which was condemned to pay a large sum, we are at a loss to imagine.

The conduct of this public officer is reprehensible. A bare inspection of the record was sufficient to indicate an appeal as the course for him to pursue, in view of his duty as an officer charged with protecting the legal rights of his client, the parish of St. Charles. He took no appeal, however; and when appellants, the tax payers of said parish, sought to exercise that right, not content with his own inaction, he files a motion joining with the plaintiff in an effort to defeat the appeal, to the prejudice of his client, the parish of St. Charles.

His reason for so doing, that the police jury, at a special meeting, confessed and recognized similar claims in the suit of Morgan Morgans against the parish, and ordered the defense withdrawn, is no excuse for the course he has pursued in this case.

The motion is denied.

On the merits there are several reasons why the judgment should be reversed:

First—In this default confirmed against the defendant, there is no proof that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury, there being no proof except these documents, adduced at the trial.

Second—If the warrants or certificates were authorized to be issued, they are not sufficient to authorize the judgment for the reasons stated in *Sterling v. The parish of West Feliciana*, 26 An. 59, a suit brought on warrants or scrip of the same kind and presenting the same question.

Police juries, in the administration of the limited powers confided to them, must provide means by taxation for the purpose and in the manner provided by law; they can not bind the parishes by putting in circulation their notes or warrants at pleasure.

Section 2786 of the Revised Statutes provides that "the police juries of the several parishes*** shall not, hereafter, have power to contract

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any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted."

Section 2787 provides that the ordinance providing means to pay the debt so contracted shall remain in force, that is, it shall not be repealable until the debt and interest are fully paid.

Section 2788 provides that where the police jury has provided for the payment of a debt by levying a tax, but refuses to cause it to be collected, relief may be had in the courts.

In the record plaintiff presents no case entitling him to relief.

The judgment must be reversed.

It is therefore ordered that the judgment appealed from be annulled, and that plaintiff's demand be rejected with costs in both courts.

Rehearing refused.

No. 5564.

LETITIA BABBINGTON v. THE PARISH OF ST. CHARLES.

It is not to be discovered in the record nor is it possible to imagine what office O. J. Flagg held that constituted him "*ex officio committing magistrate*," and that entitled him to draw a salary from the parish of St. Charles. If as district judge he discharged the duty of a committing magistrate, he was clearly entitled to no compensation from the parish, because the salary paid by the State is all that he can rightfully receive.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. M. Marks, E. B. Earhart and J. D. Augustin*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for appellants.

WYLY, J. This case is like those of O. J. Flagg, Arthur Robbins, and Morgan Morgans against the same defendant, the parish of St. Charles; and the motion to dismiss the appeal as well as the case on the merits, must be decided as they were decided.

A noticeable feature of this case is that many of the warrants sued on and which plaintiff claims as transferee, were drawn by parties no way connected with the police jury. The following is a sample, and there are several like it signed by the same drawer:

"OFFICE COMMITTING MAGISTRATE,

"Parish of St. Charles, October 1, 1872.

"The Parish Treasurer will pay O. J. Flagg or order the sum of thirty-seven dollars and fifty cents for part of quarter salary, commencing July 1 and ending October 1, 1872, as per resolution of the police jury.

O. J. FLAGG,

"Ex officio Committing Magistrate."

What office O. J. Flagg held that constituted him "*ex officio committing magistrate*," and that entitled him to draw a salary from the

Letitia Babbington v. The Parish of St. Charles.

parish, we are not informed by the record, and we are at a loss to imagine. If as district judge he discharged the duty of a committing magistrate, he was clearly entitled to no compensation from the parish, because the salary paid by the State is all that he can rightfully receive.

It is therefore ordered that the judgment appealed from be annulled, and that plaintiff's demand be rejected with costs.

Rehearing refused.

No. 4334.

JOHN CHASTANT *v.* JOSEPH ELLIOTT.

In this suit, instituted by plaintiff, the nullity of the proceedings of defendant in Iberville against plaintiff, is set up on the ground that plaintiff was an absentee, was not cited and had no knowledge of the suit brought against him there. Whether the proceedings in Iberville were regular or not is immaterial, inasmuch as plaintiff makes at the domicile of defendant the issue of the validity of the sale by defendant to him and prays judgment decreeing him to be the owner of the object sold.

The mules, which are the subject of this controversy, having been sold to plaintiff upon his promise to pay for them by a note well indorsed, payable at one year from date, bearing interest and being equivalent to cash, and after the shipping of the mules by the vendor according to the directions of plaintiff, the latter having delivered to said vendor a note, both the drawer and indorser of which were insolvent at the time, thus making said note utterly worthless to the knowledge of plaintiff, the consideration of the contract fails and the sale must be annulled and set aside.

APPPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Albert Voorhies*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

TALIAFERRO, J. The plaintiff, a resident of the State of Mississippi, complains that the defendant by *ex parte* proceedings taken against him in the parish of Iberville, obtained possession of three mules, the property of the plaintiff, and brought them to New Orleans, for which illegal and tortious act he claims damages to the amount of five hundred dollars, the restoration of the mules, or in default thereof that he recover their value, which he alleges to be six hundred dollars.

The defendant alleges in his answer that the mules in question were sold to the plaintiff upon his promise to pay for them by a note, well indorsed, payable at one year from date, bearing interest and equivalent to cash; that after respondent had shipped the mules according to the directions of the plaintiff, the latter delivered to respondent's agent a note for six hundred dollars, both the drawer and indorser of which were insolvent at the time, and the note utterly worthless to the knowledge of the plaintiff; that the price of the property has not been paid, and that plaintiff has failed to comply with the contract on his part by furnishing defendant good and solvent paper in payment

Chastant v. Elliott.

of the price. Defendant sets up in reconvention a demand that the sale be annulled, and the said note be returned to plaintiff, and that defendant be decreed to retain possession of the mules.

The judgment of the lower court was in favor of the plaintiff. It decreed the return of the mules to the plaintiff, or, in default thereof that plaintiff recover from the defendant six hundred dollars, the value of the mules. The judgment moreover awarded five hundred dollars damages in favor of the plaintiff. The defendant appealed.

Elliott, the defendant, sold by an agent the three mules in controversy to Chastant, the plaintiff, on the ninth of December, 1871, for which he delivered a note for six hundred dollars, and caused the mules to be put on board a steamer the next morning and sent to his son, in the parish of Iberville.

It appears that Elliott, as soon as he ascertained the fact of the sale and the character of the note that had been received by his agent in payment for the mules, took prompt action to recover the mules, for, on the twelfth of December, 1871, three days only after the sale, he instituted proceedings against Chastant in the parish of Iberville, and caused the mules to be sequestered, and after the lapse of ten days gave bond, took possession of the mules, and brought them back to New Orleans. In this suit, instituted by Chastant, the nullity of the proceedings of Elliott, in Iberville, is set up on the ground that Chastant, an absentee, was not cited and had no knowledge of the suit brought against him there. Whether the proceedings in Iberville were regular or not it is not important to inquire, inasmuch as Chastant makes at the domicile of the defendant the issue of the validity of the sale to him by the defendant's agent, and prays judgment decreeing him to be the owner of the mules.

The evidence throws some suspicion upon the fairness of the transaction on the part of Chastant, relating to the sale of the mules. The note is shown to have been of no value whatever at the time it was given in payment, and it is not difficult to believe that Chastant knew it. His brother was the drawer of the note, and when he was inquired of in relation to the matter, expressed surprise that the plaintiff had passed the note to the agent of Elliott, declaring his inability to pay the note. The utter insolvency of the indorser was also shown. The agent of Elliott, who sold the mules to Chastant, called on him within two days after the sale and informed him of what his brother had said about the note, and that there must be some other settlement made for the price of the mules as the note was not good, offering at the time to give him back the note. To all the remonstrances of the agent Chastant paid no regard, replying only "you have the note and I have the mules."

We conclude from the entire testimony that the judgment of the lower court was erroneous.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is ordered that the plaintiff's demand be rejected and judgment rendered against him. It is further ordered that the defendant have judgment in his favor on his reconventional demand; that the sale of the three mules by his agent to the plaintiff on the ninth December, 1871, be annulled and set aside; that the defendant be decreed to be entitled to the possession of the mules, and that the note in question be returned to the plaintiff. It is further ordered that plaintiff pay costs in both courts.

Rehearing refused.

No. 5439.

MRS. E. LEBLANC *v.* SUCCESSION OF CHARLES MASSIEU—On rule against JOHN PALSEY, security on appeal bond.

The objection that plaintiff can not proceed by rule to compel the surety on the appeal bond to pay the judgment in her favor, but must resort to a regular action, is answered adversely by the textual provision of section 37 of the Revised Statutes and the settled jurisprudence of the State.

The second objection that the court was without jurisdiction in this case, is also answered adversely to respondent, in precise terms, in section 3679 of the Revised Statutes.

It has been frequently held that where the creditor can not take out execution against the principal on the appeal bond, as in this case, he may proceed directly against the surety.

The only really important question in this suit is, does the surety on a suspensive bond in an appeal taken by an administrator or an executor from a judgment for a specific sum of money, become liable for the debt in case the judgment is affirmed? The answer is affirmative. The case at bar falls within the express provision of article 575 of the Code of Practice. The succession of Massieu was sued on a promissory note, and it was condemned to pay plaintiff ten thousand dollars, a specific sum.

Where a bond is given in reference to the law, stipulations unauthorized thereby will not invalidate it.

The assumption that the legal obligation of the succession on the note and judgment held by plaintiff is only commensurate with the ability of the succession to pay it, is a fallacy. The obligation of the surety's principal—the succession of Massieu, a judicial person—is to pay the whole debt, regardless of its ability to do so. Therefore the respondent on the rule is liable on the appeal bond for the amount of plaintiff's judgment.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Gustavus Schmidt*, for plaintiff and appellant. *Charles F. Claiborne*, for defendant and appellee.

WYLY, J. Plaintiff recovered judgment against the succession of Charles Massieu on a promissory note for \$10,000. A suspensive appeal was taken, and that judgment was affirmed by this court in 1873. After demanding, in vain, payment of this judgment from the legal representatives of the succession, the plaintiff instituted this proceeding by rule to compel John Palsey, the surety on the appeal bond, to

pay said judgment. Her demand was rejected in the court below, and she has appealed.

The first objection, that plaintiff can not proceed by rule, but must resort to a regular action, is answered adversely to the respondent in the textual provision of section 37 of the Revised Statutes, and the jurisprudence on the point is settled. See 5 An. 523; 10 An. 544, and numerous later decisions.

The second objection, the court was without jurisdiction, is also answered adversely to respondent, in precise terms, in section 3679 of the Revised Statutes.

The third objection, the rule is premature, the plaintiff not having exhausted her remedy against the principal debtor, is likewise untenable. It has been frequently held by this court, where the creditor can not take out execution against the principal on the appeal bond, as in this case, he may proceed directly against the surety. 1 An. 122; 10 An. 284, 544; 11 An. 78, 271; 20 An. 512; 25 An. 125.

The next, and really the only important question in the case is, is the surety on a suspensive appeal bond in an appeal taken by an administrator or an executor from a judgment for a specific sum of money liable for the debt in case the judgment is affirmed?

Article 575 of the Code of Practice provides that: "If an appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and further proceedings, until definitive judgment be rendered on appeal; provided the appellant gives his obligation, with good and solvent security, residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one-half the amount for which judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken." * * *

In other words this article provides that for a suspensive appeal a bond exceeding by one-half the amount of the judgment, where the same is for a specific amount, must be given within ten days after judgment, as security for the payment thereof in case it is affirmed.

Article 576 provides: "If the judgment decree the delivery of some movable of a perishable nature, the court shall require security to an amount exceeding by one-half the estimated value of such movable."

Article 577 provides that if the judgment be for the delivery of real estate, not of a perishable nature, surety shall only be required for an amount exceeding by one-half the estimated value of the revenue thereof pending the appeal, and for such further amount as the judge

may determine as security for deterioration of the property during the same period.

These are the articles of the Code of Practice in relation to suspensive appeals. The case at bar falls within the express provision of article 575. The judgment was for ten thousand dollars, "a specific sum," and in our opinion a bond exceeding by one-half the amount thereof was required in order to obtain a suspensive appeal.

A bond for that amount was given within ten days, and the effect thereof is not impaired in consequence of the following clause inserted therein: "This bond furnished is to serve only if the five hundred dollar bond previously furnished is declared or proved insufficient." The bond was given in reference to the law, and stipulations unauthorized thereby will not invalidate it. 6 N. S. 498; 2 La. 397; 16 La. 173; 9 R. 535; 4 An. 372; 7 An. 571; 12 An. 68; 13 An. 604; 15 An. 551.

The respondent, however, insists that where a succession is appellant, a bond only for costs is required in order to obtain a suspensive appeal, and in support of this position he cites the case of the State ex rel. Gausson v. the Judge of the Second District Court, 21 An. 43. It is true that the decision of this court, delivered by Mr. Justice Isley, maintains this position on the authority of *Blanchin v. The Steamer Fashion*, 10 An. 345, and the State ex rel. Hickey v. the Judge of the Fourth District Court, 20 An. 108. These and other authorities were examined at length in the dissenting opinion of Mr. Justice Taliaferro in that case. After carefully considering the opinion and the dissenting opinion in that case, we feel constrained to overrule it, believing the doctrine stated in the case of *Blanchin v. The Steamer Fashion*, which was followed in the case of the State ex rel. Hickey v. the Judge of the Fourth District Court, is not applicable to a case like this, where a defendant, condemned to pay a specific sum of money, takes a suspensive appeal.

The case of *Blanchin* was this: He obtained judgment against the owners of the steamer *Fashion*, with privilege on the boat. Execution issued, the boat was sold and the proceeds thereof were in the hands of the sheriff, pending several third oppositions of parties claiming a privilege superior to the seizing creditor.

The court of the first instance, by its decree, distributed the funds among these third opponents, giving the seizing creditor, *Blanchin*, no part thereof. He took an appeal, giving bond within ten days for one hundred and fifty dollars, the amount fixed by the court. The question was whether this bond was sufficient for a suspensive appeal? This court held that there were cases where the requirement of article 575 C. P., in regard to the bond exceeding by one-half the amount of the judgment, is inapplicable; that this expression applies to a judgment

where the appellant has been compelled to pay; that it seems inapplicable to a judgment where the appellant was condemned to pay nothing; that there was a judgment merely ordering the distribution of funds in the hands of the sheriff; that the appellant, Blanchin, was entitled to a suspensive appeal from the judgment which debarred him from a participation in a fund which had been provided by his own exertions; and that as there was no standard fixed by law for the bond and security to be given by him in obtaining such appeal, the judge obviously had the discretion to fix the amount of the bond. In that case no judgment condemning Blanchin to pay "a specific sum" was sought or obtained. He had the right to appeal, and the fund in the sheriff's hands should remain and not be distributed pending such appeal. This was necessary to protect his rights. Why should he give security for more than costs? Why should he give bond and security for the fund in the hands of the sheriff? The court very properly held that the case was not within the meaning of that part of article 575 C. P., requiring the amount of the bond to exceed by one-half the amount of the judgment, and as there was no standard fixed by law for the bond and security to be given in such a case, the judge could exercise his discretion. It would be unreasonable and manifestly unjust to compel a seizing creditor to give bond and security pending the litigation of a *concursum* for the funds in the hands of the sheriff. He might be driven by such a requirement to abandon his rights rather than incur such a responsibility.

The case at bar is entirely different. Here is no controversy for the distribution of funds in the hands of the sheriff, where there is no standard to fix the amount of the bond, because the appellant is condemned to pay no "specific sum." On the contrary, the succession of Charles Massieu was sued on a promissory note, and it was condemned to pay plaintiff ten thousand dollars. The case falls clearly within the provision of article 575 C. P., fixing a standard for the amount of a suspensive appeal bond. The law being clear and free from ambiguity, the letter thereof can not be disregarded under pretext of pursuing its spirit. Revised Code-13.

It is urged, however, that as a surety ought not to be bound to pay more than his principal is liable for, so that if he pays he may be fully subrogated, the respondent should not be held liable for the full amount of plaintiff's judgment, because at the final settlement of the succession of Massieu there may not be that amount due to plaintiff.

This fallacy lies in the assumption that the legal obligation of the succession on the note and judgment held by plaintiff is only commensurate with the ability of the succession to pay it. Such is not the case. The obligation of his principal, the succession of Massieu, a juridical

person, is to pay the whole debt, regardless of its ability to do so. The obligation of the executors, however, is to discharge faithfully their duties; they are not individually bound to pay any of the debts.

Our conclusion is that John Palsey, the respondent in the rule, is liable on the appeal bond for the amount of plaintiff's judgment.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that the rule herein be made absolute and that the plaintiff recover of the respondent, John Palsey, the full amount of the judgment, interest and costs recovered heretofore by plaintiff against the succession of Charles Massieu. It is further ordered that appellee pay costs of both courts.

Rehearing refused.

No. 5687.

SUCCESSION OF JAMES N. BROWN.—Homologation of accounts and opposition thereto.

On the tenth of July, after a protracted contest, an order was rendered by the court, homologating the accounts of the executor so far as not opposed. On the fifteenth of September of the same year, Isaac D. Brown, another of the heirs of the deceased, presented an opposition to the accounts. The executor properly objected to it on the ground that the judgment homologating the accounts formed *res judicata* as to his opponents.

Credits claimed by the executor for payment of sums of money to certain heirs, except one not opposed, were correctly rejected by the judge *a quo*. These sums received by the heirs will more properly be adjusted by collation in a final partition among them of the succession.

The court reserves to the executor the right to claim, in a final settlement and partition of the estate, all amounts he alleges to have paid to the heirs.

The judge *a quo* properly struck from the executor's accounts such items as do not come within that class of necessary articles indispensable in the cultivation of a plantation.

APPEAL from the Parish Court, parish of Iberville. *Crowell, J. Barrow, Pope & Robertson*, for accountant. *Mathews & Wailes*, for Mrs. Feltus and husband, opponent. *J. O. Fuqua, A. & E. B. Talbot*, for Isaac D. Brown. All the parties have appealed.

TALIAFERRO, J. The dative testamentary executor of James N. Brown was required by an order of the parish court of Iberville, rendered on the sixteenth of November, 1869, at the instance of one of the heirs, to file an account of his administration of the estate. No regard, it seems, was paid to this order until the fifth of October, 1870, two days after a suit was brought against the executor to remove him from office, which was subsequently done by decree of the parish court of that parish and confirmed on appeal to this court. 24 An. 187.

The executor filed an account on the fifth of October, 1870; a second one on the twenty-fourth of that month, and a third on the sixteenth of October, 1871.

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To these several accounts oppositions were filed by Mary E. Brown, one of the heirs (wife of Feltus.) On the tenth of July, 1873, after a protracted contest, and the accumulation of evidence which has swelled the record to an inordinate size, an order was rendered by the court, homologating the accounts so far as not opposed.

On the fifteenth of September, 1873, Isaac D. Brown, another of the heirs, presented an opposition to the accounts.

This was objected to on the part of the executor on the ground that the judgment homologating the accounts formed *res judicata* as to this opponent. The court allowed the opposition to be filed, and a bill of exceptions was taken.

We think the exception was well taken and that the opposition of Isaac D. Brown should not have been admitted. 23 An. 528; 20 An. 359; 1 La. 371; 22 An. 332; 3 An. 383.

We shall then consider this controversy as limited to the opposition of Mary E. Brown—Mrs. Feltus. The property of the succession of James N. Brown, who died in the year 1859, consisted principally of two large plantations, one in the parish of Plaquemines, called the Oakland plantation, the other in the parish of Iberville, called the Manchac place. The two executors appointed by the will of James N. Brown, viz: his oldest son, John M. Brown, and Gilbert Hawkins, who qualified in October, 1859, died—the former in September, 1864, the latter previous to that time. James A. Ventress was, therefore, in October, 1864, appointed dative testamentary executor. The oppositions to his accounts form the subject matter of this litigation.

There appears to have been no debts against the estate. There are four heirs. Julia A. Brown, wife of James A. Ventress, the executor; Mrs. Feltus, the opponent; the heirs of John M. Brown (representing their father), and Isaac D. Brown.

The Oakland plantation, it appears, was taken possession of during the war by the United States' authority as captured or abandoned property. It was restored afterward—at what time does not appear; but not without some delay and at the cost of \$2500, paid counsel for their legal efforts in obtaining its release. The executor's first account commences with an exhibit of the proceeds of crops of the year 1864, and the first item on the credit side of that account is the sum of \$2500, paid counsel for aid in regaining possession of the Oakland place. The executor's first account includes the business affairs of the Oakland place, its revenues and expenses, the disbursements of the executor on account of the estate, etc., commencing with the crop of 1864, and coming down to the year 1869, inclusive. His second account purports to show the revenues, expenditures, etc., of the Manchac place for the same period. The third account shows the extent of the crop of the

Manchac place for the year 1870, the expenses incurred and net proceeds of the same.

The oppositions to these accounts present objections that are very numerous, and the contestation arising from them in the lower court was not free from a display of acrimony and embittered feeling.

On the trial of the case the court below sustained the oppositions mentioned in its judgment, amounting in the aggregate to \$25,595 20 ; and judgment being rendered against the executor for that amount, all the parties have appealed.

The opponent, Mary E. Brown, prays an amendment by this court of the judgment of the lower court in favor of the estate of James N. Brown against the estate of James A. Ventress, for the sum of \$19,968, on the following ground: That the executor used assets of the estate he administered to acquire property for himself and Feltus, as shown by the record, containing an act of sale from Waddell to James A. Ventress and H. J. Feltus of a large body of land, the consideration being the surrender to Waddell by Ventress of mortgage notes of the above amount, which the act of sale shows belonged to the estate of Brown.

She also prays an amendment of the judgment of the lower court in regard to the charge of \$70,000 in the account against her, as the price of Oakland, and with respect to the charge of commissions thereon.

The opposition to this charge is that there has never been a legal sale of Oakland to her; that the pretended sale of it to her is a nullity.

The judge of the lower court refused to pass upon the question as to the validity of this sale.

It may here be stated that the defense of the executor is placed mainly on the ground that although he was appointed dative testamentary executor and assumed the functions of executor, still, in point of fact, the succession was, by consent of the heirs, administered chiefly by himself and H. J. Feltus, acting on the part of his wife, the opponent in this case; that Feltus and family went on the Oakland plantation in 1865 to live; that by an agreement between the executor and Feltus, whatever was shipped to the plantation was for the use of the place, and that all disbursements and payments were made by Feltus; that Feltus really had charge of the place; that there were no debts owing by the estate, and that it was managed for the benefit of the heirs; that the purchases made for the plantations and the expenditures incurred for carrying on the business upon them having been participated in and made by the sanction of the opponent and her husband, they should not now be heard in objecting to them.

The executor charges to the account of the estate and claims credit against it for purchases from and payments made to his own wife one

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of the heirs, amounting to about seven thousand dollars ; likewise for payments made to Mrs. Feltus for a similar amount, and for an amount exceeding three thousand dollars for payments to his sister, the widow of John M. Brown, deceased, one of the heirs. These credits, except the amount paid Mrs. Feltus, not opposed, claimed by the executor, were rejected by the lower court, and we think correctly. These sums received by the heirs will more properly be adjusted by collation in a final partition among them of the succession. Examining next the other oppositions that were sustained, the first in order is that made to the accounts of George A. White presented as vouchers for the payment of supplies purchased for the Oakland plantation. It appears that the executor established a store and trading establishment on Oakland and sold to the laborers on the plantation and to others, goods of the description and kind usually kept in stores of that sort. These goods were purchased from White. Among them were articles of supplies necessary for the carrying on of a plantation. The judge *a quo* seems to have stricken from these accounts such items as do not come within that class of necessary articles indispensable in the cultivation of a plantation. This was properly done. The estate should not be made to pay for goods wholly unnecessary for the business of the place and from the sale of which the executor doubtless realized large profits. The executor's commissions were allowed against the opposition made to it. For failing to file an account when ordered to do so, the executor, as we have seen, was removed from office by a formal judgment of the parish court of Iberville, confirmed by decree of this court. The judgment divesting him of his office did not impose upon him the penalties prescribed by article 1465 of the Revised Statutes nor deprive him of his commissions. We are not satisfied that the evidence clearly establishes a case like that of Lee, 4 An. 518, where the administrator was deprived of his commissions because his administration had been positively injurious to the succession instead of beneficial.

The items set down upon the account of the executor as discount on his notes issued to raise money, and those for commissions to Burbridge for indorsing them were properly rejected. Two or three witnesses say the estate was out of funds ; but no exigency is shown to have existed making it absolutely necessary to raise money at extravagant rates and upon unfavorable terms.

The amendments prayed for by the opponent we see no just cause for making. It is satisfactorily shown in our opinion that the Waddell notes were not the property of the succession of James N. Brown, but that they belonged to the minor heirs and were under the control of John M. Brown their former tutor, and eventually in the hands of Ventress as tutor.

The claim of \$19,968, alleged to have been due the estate of James N. Brown by the commercial firm of Hawkins & Norwood, and which the opponent contends the executor should be made to account for on the ground that he released Norwood, one of the partners, on condition of the extinguishment of the indebtedness of John M. Brown to that firm of \$22,240, we think entitled to little consideration. This claim, if it have any merit, can not, any more than the Waddill notes, be brought into the settlement of the executor's account. To the claim of the opponent, to have the sale of the Oakland plantation annulled, and that estate thrown back into the succession, the executor opposed very properly the plea of *res judicata*. That question was definitively settled adversely to the opponent by decree of this court rendered in April, 1872. 24 An. 300.

After following out the various grounds of opposition set up, and the disposition made of them by the lower court, we are not inclined to alter the decree which it rendered.

It is therefore ordered that the judgment appealed from be affirmed with costs.

The court reserves to the executor the right to claim in a final settlement and partition of the estate all amounts he alleges to have paid to the heirs.

Rehearing refused.

No. 5374.

STATE OF LOUISIANA ex rel. ATTORNEY GENERAL, on information of
DR. J. B. COOPER, v. DR. F. SCHUMAKER et al.

Act No. 92 of the acts of 1869, under which Dr. Cooper claims title as police surgeon of the Metropolitan force, fixes the term of the office, in the ninth section thereof, as being during good behavior. Act No. 60 of the acts of 1874 in no manner proposes to amend act No. 92, so as to change the term of office. The act of 1869 remains in force, with this limitation, however, resulting from act No. 60, that the police commissioners, in reducing the police force, may "honorably discharge such members as in their judgment may seem needful." Thus, under this amendment they could have discharged Dr. Cooper, but they had no warrant to remove him as they did, merely to appoint Dr. Schumaker. Power granted for one purpose can not be employed for another.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, *Braughn, Buck & Dinkelspiel*, for relator and appellant. *Wm. H. Hunt*, for Schumaker. *J. Q. A. Fellows*, for J. S. Clarke, defendants and appellees.

WYLY, J. This is a controversy for the office of Police Surgeon of the Metropolitan Police District.

Act No. 92 of the acts of 1869, under which Dr. J. B. Cooper claims

title, fixes the term of the office, in the ninth section thereof, during good behavior, and provides that the incumbent is liable to removal from office "only after written charges shall have been preferred against him, according to the rules and regulations of said board of commissioners." No written charges were preferred against him. But on the twenty-third day of March, 1874, he received notice from the clerk of the Metropolitan Police Board that he was honorably discharged under the provision of section 3 of act No. 60 of the acts of 1874, and Dr. F. Schumaker was appointed in his place.

Act No. 60 of the acts of 1874 is a statute to amend sections 6 and 10 of act No. 92 of the acts of 1869. It in no manner proposes to amend section 9 of the said act fixing the term of office during good behavior.

The third section of this statute declares that the Board of Metropolitan Police Commissioners "is hereby authorized and directed within sixty days after the passage of this act, to reduce its expenses and reorganize and reduce the Metropolitan Police force in such manner and to such extent as economy and the limitations of expenditures empowered by law may require, and to this end it may honorably discharge such members of the Metropolitan Police force as in its judgment may be needful and proper."

This section authorizes the removal of an officer for the purpose of reducing the Metropolitan Police force, with a view to economy or to limiting the expenditures of the police commissioners.

It is "to this end," in the language of the section, that the power to discharge members of the Metropolitan Police force is granted.

Section 9 of act 92 of the act of 1869, fixing the term of office during good behavior, is not repealed. It remains in force, with this limitation, however, that the police commissioners in reducing the police force may "honorably discharge such members" as in their judgment may be needful.

If they desired to reduce the number of police surgeons, the police commissioners under this amendment could have discharged Dr. J. B. Cooper. But in this law there is no warrant to remove him as they did, merely to appoint Dr. F. Schumaker. The removal of Cooper and the appointment of Schumaker was in no sense the exercise of the authority granted for the purpose of reducing the number of police surgeons. Power granted for one purpose only can not be employed for another.

Giving effect to section 9 of act 92 of the acts of 1869, and also to the section of the act of 1874 quoted, we conclude that the police commissioners could not remove Dr. Cooper for the purpose of creating a vacancy to be filled by the appointment of Dr. Schumaker. No

charges were preferred against Dr. Cooper, and he was not legally removed. He is entitled to the office.

It is therefore ordered that the judgment herein in favor of the defendant be annulled, and it is decreed that Dr. J. B. Cooper is entitled to the office of police surgeon; that Dr. F. Schumaker is illegally holding said office, and he is hereby enjoined and inhibited from interfering in the administration thereof. It is further ordered that the defendant, Dr. F. Schumaker, pay costs of both courts.

No. 5722.

STATE OF LOUISIANA ex rel. TEMPLE S. COONS v. THE JUDGE OF THE
SUPERIOR DISTRICT COURT.

In the injunction case of Coons v. Cannon et als., on exception of no cause of action being disclosed by the petition, the injunction was dismissed as in case of nonsuit. Plaintiff, alleging that defendants were largely indebted to him, and in possession of the steamer Katie, of which he claimed to be part owner, and that they were about to sell her, had applied for an injunction restraining the sale, which was granted upon his furnishing bond in the sum of \$1000. From the order dissolving said injunction as aforesaid, plaintiff prayed for a suspensive appeal on his furnishing his bond in the sum of \$250. The district judge refused a suspensive appeal except on a bond of \$25,000, and appellant now applies for a mandamus to compel the judge *a quo* to allow the suspensive appeal on a bond of \$250.

It is true that no moneyed judgment is rendered against the relator, nor is he ordered to deliver any property, but he sought to restrain the defendants from selling a valuable piece of property worth \$60,000. The court below dismissed his pretensions. If he obtains a suspensive appeal on a mere nominal bond, he perpetuates the injunction, at all events, until his appeal is disposed of. His injunction bond being only for \$1000, it is easily seen that in case of failure, the defendants are without that security for damages which the law provides for them.

Under these circumstances, the bond which relator should be required to give on his suspensive appeal is not the value of the property in dispute, but the amount of damages which may result from the improper issuing of the injunction, and which this court thinks would be covered by the sum of five thousand dollars.

APPPLICATION for a writ of mandamus against the Judge of the Superior District Court, parish of Orleans. *Thomas Hunton, Alfred Shaw, F. B. Earhart*, for relator. *Hawkins*, respondent, *in propria persona*.

MORGAN, J. In the suit of Coons v. Cannon et als., plaintiff brought suit to recover from the defendants a large sum of money, and to be decreed to be part owner of the steamer Katie. Alleging that defendants were in possession of the steamer, and that they were about to sell her, he applied for an injunction restraining the sale, which was granted to him upon his furnishing bond in the sum of \$1000. On exception of no cause of action being disclosed by the petition, the suit was dissolved as in case of nonsuit. From this judgment he asked for a suspensive appeal upon his furnishing bond in the sum of \$250.

State of Louisiana ex rel. Coons v. The Judge of the Superior District Court.

The district judge refused a suspensive appeal except on condition of the appellant's giving bond in the sum of \$25,000. He applies for a mandamus compelling him to allow the suspensive appeal upon a bond for \$250.

The relator relies upon the case of *Hickey v. The Judge of the Fourth District Court*, 20 An 108, in support of his application. The object of that suit was to annul a certain sale and transfer of all the plaintiff's right, title and interest in the successions of her grand parents, which she had made to the defendant. There was judgment against him, and he applied for a suspensive appeal, which the district judge refused him, except upon his furnishing bond in the sum of \$25,000. This court ordered the district judge to grant the appeal upon his furnishing bond for \$250. No moneyed judgment was rendered against the defendant. He was not ordered to restore any property. In effect the decree only reinstated her in her rights as an heir of her grand parents, and entitled her to a portion in their estates. The judgment was properly rendered and has remained undisturbed.

But here the case is different. It is true no moneyed judgment is rendered against the relator, nor is he ordered to deliver any property, but he sought to restrain the defendants from selling a valuable property. The court dismissed his pretensions. If he obtains a suspensive appeal upon a mere nominal bond, he perpetuates the injunction, at all events, until his appeal is disposed of. It is true he has given an injunction bond in the sum of \$1000, but the property is estimated to be worth some \$60,000, and it is easily seen that in case of failure, the defendants are without that security responsive in damages, which the law guarantees to them.

In the case of the *State v. The Judge of the First District Court*, 19 La. 167, it was held that "the judgment last appealed from being one of nonsuit only, it is clear that the appellant being bound to furnish his bond and security for a sum exceeding one-half the amount for which the judgment was given against him, and the said judgment being merely for costs, the bond was properly required for the sum of \$250."

In the case referred to, when Walden obtained his injunction, he gave bond in the sum of \$20,000. The effect of the injunction was to restrain the City Bank from issuing any order of seizure and sale upon notes amounting to \$200,000, secured by mortgage upon certain real estate. On the dissolution of the injunction, he and his sureties were condemned to pay *in solido* ten per cent. per annum on the amount of the judgment bond. On appealing from this judgment he gave an appeal bond in the sum of \$6000; when the order of seizure and sale first applied for after the dissolution of the injunction was refused, the

district judge was of the opinion that the bank could not proceed against Walden by the *via executiva*, so long as the appeal was pending, for that appeal necessarily revived the injunction. When the petition of appeal was presented to him, the lower judge only required a bond and security in the sum of \$250.

"But," say the court, "it is contended that in order to prevent the bank's obtaining an order of seizure and sale, by virtue of the mortgage, that is to say, to give effect to and to revive the writ of injunction during the pendency of the cause before this court, the appellant ought to have furnished his appeal bond and security for \$300,000, as the security on the injunction bond was only given to secure damages, and not the debt. We can not agree to this proposition; we conceive that, by obtaining his writ of injunction and furnishing the security required by the judge, Walden became entitled to the protection of the court, and to its interposition so as to prevent the seizure and sale of the property mortgaged as long as the matter in controversy remained undetermined. On the dissolution of the injunction with damages in the court below, he took a regular suspensive appeal, which necessarily had the effect of maintaining the injunction, and of leaving the case, and all the orders under it, in the same state in which they were previous to its being dissolved." But the court went on to say and to decide that "as the writ applied for is not a writ of right, and as we conceive it is in our power to grant it with such condition as will secure to the party who may suffer by it, a sufficient indemnity for the losses, trouble and delay which it may perhaps unjustly and improperly occasion him to sustain, we think it our duty under the circumstances of the case to require that, before the issuing of the writ of prohibition by him prayed for, the applicant shall file with the clerk of this court his additional bond, in favor of the City Bank, with good and sufficient security *in solido* for the sum of \$75,000, conditioned that he shall pay all such damages as shall have been sustained by the said bank, in case it should be decided that the injunction heretofore obtained has been wrongfully sued out, and illegally and improperly kept in force on the appeal before this court."

Under the authority of this case we feel justified in saying that the relator is entitled to a suspensive appeal, and that the bond which he should be required to give is, not the value of the property in dispute, but the damages which may result from the improper issuance of the injunction. These damages would, we think, be covered by an additional bond for five thousand dollars.

It is therefore ordered that the rule be made absolute, and that a suspensive appeal be allowed to the relator upon his furnishing bond and security in the sum of five thousand dollars.

 Rochereau & Co. v. Colomb. Vredenburg v. Mrs. Elizabeth Brooks.

No. 5539.

EUGENE ROCHEREAU & Co., in liquidation, v. H. OCTAVE COLOMB.
 Third opposition and injunction of ELIZABETH BROOKS, wife of H.
 OCTAVE COLOMB; W. H. VREDENBURG v. MRS. ELIZABETH BROOKS,
 wife of H. O. COLOMB, and husband. Third opposition of E. ROCHE-
 REAU & Co., in liquidation. (Consolidated.)

The only important question in this case is, could a judicial mortgage, resulting from the recordation of a judgment against the vendee, attach to the property sold, to the prejudice of the vendor's privilege and mortgage to secure the price, in consequence of the delay in recording the mortgage? The answer is negative. The mortgage and privilege were recorded in the parish of St. James, where the property is situated, simultaneously with the act of conveyance. As to third persons, the sale had no effect until it was duly recorded where the property is situated. It is certain that the creditors of the vendor might have seized and sold the property before the registry of the sale in St. James parish, free from any claim of the vendee's creditors, but if their judicial mortgage had attached as soon as the sale had been made, this could not be.

APPEAL from the Fourth Judicial District Court, parish of St. James.
Flagg, J. Gaudet & Roman, for opponent and plaintiff in injunction and appellee. *Berault & Legendre*, for Rochereau & Co. in liquidation, appellants. *Marr & Foute*, for Paul Cook and Samuel Eugler, third opponents and intervenors. *Tissot & Julien Michel*, for W. H. Vredenburg, plaintiff and appellee.

LUDELING, C. J. On the twentieth of December, 1869, D. F. Kenner, sold to Mrs. E. Brooks, wife of H. O. Colomb, a plantation, situated in the parish of St. James. For part of the price, a note for \$7952, with interest, was executed, and a mortgage and vendor's privilege were retained on the property to secure the payment. This act of sale and mortgage was passed in New Orleans, and the act was recorded in the book of conveyances and mortgages in St. James, ten days after it was executed.

The only important question in this case is, could a judicial mortgage, resulting from the recordation of a judgment against the vendee, attach to the property to the prejudice of the vendor's privilege and mortgage to secure the price in consequence of the delay in recording the mortgage?

The mortgage and privilege were recorded simultaneously with the act of conveyance. If the delay in recording the act in St. James parish could defeat the vendor's privilege and mortgage, the necessary delay for recording the mortgage after the agreement to sell or after the signing of the act of sale would also defeat the vendor's privilege, for the theory of the third opponents is, that as soon as the property was acquired by the vendee their judicial mortgage attached. They cite the case of *Lombas v. Collet* to support this theory. 20 An. 80. From the statement of the facts in that case we are not informed whether the act of sale had been recorded in the parish before the mortgage

Bochereau & Co. v. Colomb. Vredenburg v. Mrs. Elizabeth Brooks.

was recorded in the mortgage book, and this point does not appear to have been considered.

As to third persons, the sale had no effect until it was duly recorded where the property is situated.

It is certain that the creditors of the vendor might have seized and sold the property before the registry of the sale in St. James parish free from any claim of the vendee's creditors. But if their judicial mortgage had attached as soon as the sale had been made, this could not be.

"All sales, contracts and judgments affecting immovable property which shall not be recorded, shall be null and void, except between the parties thereto," etc. C. C. 2266.

It is therefore ordered that the judgment of the district court be affirmed with costs of appeal.

Rehearing refused.

No. 5111.

FRANK S. GARNER, Administrator, *v.* R. K. ANDERSON, Tax Collector.

The position taken by the plaintiff that the tax collector has no right to sell forfeited lands is not correct. It has already been decided that when the plaintiff repudiates his own title and sets up that of the State he shows no cause to complain, and if the tax collector has no authority, as he alleges, to sell forfeited lands, there will be no divestiture of title, and no injury can result, at least to the plaintiff.

The tax collector charged with the duty of collecting all the taxes, the delinquent list included, has authority to sell forfeited lands, reserving to the former owner the right of redemption according to the statutory provisions on the subject. The decision given in the case of *Hall v. Hall*, 23 A. n. 135, has no bearing on the statutes under consideration, because they were enacted subsequent to the controversy in that case.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. E. J. Delony*, for plaintiff and appellee. *Hiram E. Steele*, district attorney, for defendant and appellant.

WYLY, J. The plaintiff, the administrator of the succession of Warren M. Benton, enjoins the defendant, the tax collector of Carroll parish, from selling the lands described in the petition for the taxes, penalties, and costs for the year 1871. The court perpetuated the injunction, and the defendant appeals.

Two grounds are urged in this court in support of the injunction :

First—The plea of payment.

Second—The property has been returned to the State on the delinquent list of 1871, and the tax collector has no right to sell forfeited lands.

The first point is a question of fact not established by the evidence. It is true a receipt given by the former tax collector shows a settlement of these taxes by a draft drawn by the deceased on John Chaffe, Bro.

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& Son. But proof was admitted, without objection, showing that the understanding of the parties was that the draft should not operate as a receipt for the taxes unless it should be honored by the drawees, and it was not so honored.

The position that the land has been forfeited to the State puts the plaintiff out of court, because, as was said in the case of *Morrison v. Larkin*, tax collector, 26 An., when the plaintiff repudiates his own title and sets up that of the State he shows no cause to complain, and if the tax collector has no authority, as he alleges, to sell forfeited lands, there will be no divestiture of title and no injury can result, at least to plaintiff.

But in the case referred to, after a thorough examination of the question, this court held that the tax collector charged with the duty of collecting all the taxes, the delinquent list included, has authority to sell forfeited lands, reserving to the former owner the right of redemption, stated in section 6 of the act 47 of the acts of 1873, provided the amount bid shall exceed the total amount of taxes, penalties and costs due to the State. The plaintiff, however, cites the case of *Hall v. Hall*, 23 An. 135, to show that after lands have been forfeited to the State, the tax collector ceases to have authority in relation thereto. That case arose prior to the passage of the act No. 42 of the acts of 1871, conferring authority, as indicated in the title, upon tax collectors to collect back taxes, and authorizing the delinquent lists to be put in their hands for the purpose. The decision cited has no bearing on the statutes under consideration, because they were enacted subsequent to the controversy in that case.

Our conclusion is the injunction must be dissolved without damages. See *Morrison v. Larkin*, tax collector, 26 An.

It is therefore ordered that the judgment herein be annulled, and it is decreed that the injunction be dissolved and plaintiff pay costs of both courts.

No. 3932.

CHARLES JOSEPH GOURGUES v. CHARLES T. HOWARD et als.

There can be no damages awarded for an illegal arrest, unless the same was maliciously procured.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont*, J. Jury trial. *A. L. Tissot*, for plaintiff and appellee. *Joseph P. Hornor*, for defendants and appellants.

MORGAN, J. Libano is an authorized vender of lottery tickets in the company of which Howard, one of the defendants, is a manager. Bernard is in the employ of Libano, and is authorized by him to sell

tickets. Libano caused the plaintiff to be arrested on the charge of having forged a ticket purporting to have issued from his office. He was in actual custody and confined about an hour, when he was released on bail. The charge was investigated by a committing magistrate. Plaintiff was sent before the Criminal Court. There the proceedings were dismissed.

He now sues Howard, Libano, and Bernard for \$25,000 damages for malicious arrest and imprisonment. He had a verdict for \$1000. Defendants appeal.

As regards Bernard, he seems to have had nothing to do with the arrest. Consequently, the judgment against him was wrong.

As regards Howard, he did not make the affidavit upon which the arrest was made, nor did he cause the plaintiff to be arrested. As to what took place in his office between him and Libano and Gourgues, there appears to be some discrepancy in the evidence, Gourgues swearing that Howard told Libano to have him arrested, and Libano swearing that Howard only told him that "he knew what to do." This is not sufficient grounds for making Howard responsible for malicious arrest.

As regards Libano, it appears that the plaintiff claimed from Bernard the payment of a prize represented by a ticket which the plaintiff alleges he purchased from Libano's office through Bernard. Bernard pronounced the ticket a forgery, and refused to pay. Plaintiff then met Libano in the street and complained to him that his ticket had not been paid. Upon being shown the ticket Libano pronounced it to be a forgery. They went together to the office of the company and examined the list upon which, by regulation of the company, the numbers on the ticket should appear, the plaintiff protesting that he had nothing to do with the list, and claiming that having purchased the ticket he was entitled to be paid the prize which it had drawn. Some altercation took place between them, each threatening the other with arrest, and each going together to the magistrate's court to obtain a warrant of arrest. For some reason the magistrate refused to issue a warrant against Libano, but he issued one against Gourgues.

There can be no damages awarded for an illegal arrest, unless the same was maliciously procured. 6 An. 577. And we do not see any malice on the part of Libano. He certainly believed that the ticket was a forgery, and in this belief he is fortified by the testimony of all those who knew Bernard's writing.

Under these circumstances we do not see any foundation for the plaintiff's claim.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be avoided, annulled, and reversed, and that there be judgment in favor of the defendants with costs in both courts.

No. 4097.

E. NEWMAN & CO. v. JOHN EATON AND WIFE.

On the thirty-first of January, 1872, John Eaton made to his wife a *dation en paiement*. On the sixth of February, 1872, the plaintiffs obtained a judgment against Eaton on a debt which was contracted before the *dation en paiement*. The donation by him to his wife of certain checks, mentioned in his contract of marriage, was perfected by the marriage. The money collected by the husband from the banks on said checks, as well as the price of a slave mentioned in said contract of marriage as belonging to the wife, was her property, for which she had a mortgage on her husband's property to secure its restitution. Before any other mortgage in favor of the plaintiffs had attached to said property, he gave it to his wife in payment of the said sum due to her. This giving in payment was lawful.

The property thus given to the wife by the future husband was extra dotal, because the title of the wife was not indefeasible until the marriage was consummated.

Article 2335 C. C. declares that the separate property of the wife is divided into dotal and extra dotal. In this case it is immaterial whether the checks aforesaid were dotal or extra dotal. In either case the wife had a mortgage on the property transferred to her, and the creditor was not injured, as it is admitted that the price for which the property was transferred to the wife is a fair and full price.

Had the husband been insolvent when the *dation en paiement* was made, that fact would not have prevented the giving in payment, to replace the wife's paraphernal property alienated during marriage.

There is no force in the objection that the wife assumed the payment of a mortgage which the Citizens' Bank had on the property transferred to her. She took the property *cum onere* in payment of her claims. The plaintiffs, at least, have no interest in raising this objection.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. E. H. McCaleb*, for plaintiffs and appellees. *Albert Voorhies*, for defendants and appellants.

LUDELING, C. J. The plaintiffs, creditors of John Eaton, sued to set aside a *dation en paiement* by him to his wife, on the grounds that there was no debt due the wife; that the husband was insolvent at the time he made the giving in payment, and that in the act by which the giving in payment was made, the wife assumed the payment of the debt of the husband.

There was judgment in favor of the plaintiff, and Mrs. Eaton has appealed.

On the twenty-ninth of September, 1851, John Eaton and Celeste Landry entered into a marriage contract, passed before H. L. Duffel, notary public in the parish of Ascension. This contract states that "the future wife brings in marriage as separate or extra dotal property, a slave of yellow complexion, named Sally, aged about fifteen." It further states that—

"Article 4—In view of the future marriage, and to secure the future welfare of his intended wife, and as a token of his affection for her, the said John Eaton does hereby make a donation to the said Marie Celeste Landry, of the sum of ten thousand dollars, represented by three checks, drawn this day by J. H. Morrison & Co.; one, No. 2338,

sum of \$4000; the second, No. 416, on the Louisiana State Bank, for the sum of \$3000; the third, No. 139, on the Bank of Louisiana, for the sum of \$3000; all payable on demand, to the order of Marie Celeste Landry, which said checks after having been, by me notary signed 'Ne varietur' to identify them herewith, were handed to the future spouse, who immediately indorsed and returned them to the donor, for the purpose of collecting them to her use and benefit.

"Article 5—Marie Celeste Landry does hereby constitute the above sum of \$10,000 as her dowry, and stipulates that in case of her death without issue from the present marriage, she makes a donation to her future husband of the amount thus constituted by her in dowry."

On the thirty-first of January, 1872, the husband made the *dation en paiement*. On the sixth of February, 1872, the plaintiffs obtained their judgment against the husband, on a debt which was contracted before the *dation en paiement*.

We think the donation of the checks mentioned in the contract of marriage was perfected by the marriage; that the money collected from the banks on said checks belonged to the wife, and that the money thus collected by the husband, as well as the price of the slave sold and received by him, was the paraphernal property of the wife, for which the wife had a mortgage on her husband's property to secure its restitution. Before any other mortgage against the husband had attached to the property, the husband gave it to his wife in payment of the said sums due her. It is evident that if the wife had recorded her mortgage on the day the giving in payment was made, her mortgage would have attached to the property, and she could have sold the property under her mortgage to satisfy her debt, without giving just grounds to her husband's creditors to complain. We think it equally clear that he could make the giving in payment lawfully.

We say the property given to the wife by the future husband was extra dotal, because the title of the wife was not indefeasible until the marriage was consummated.

"Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage, by other persons than the husband, is part of the dowry," etc. 2338.

Therefore, the property which is declared to be given to her in consideration of the marriage by the husband, is paraphernal.

Article 2335 declares that the separate property of the wife is divided into dotal and extra dotal. In the case now under consideration, it is immaterial whether the checks were dotal or extra dotal; in either event the wife had a mortgage on the property transferred to her, and the creditor was not injured, as it is admitted the price for which the drawn on the Merchants' and Traders' Bank of New Orleans, for the

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property was transferred to her is a fair and full price. C. C. 3319; 2 An. 834.

The evidence in the record does not satisfy us that John Eaton was insolvent at the date the *dation en paiement* was made; but had he been, that fact would not have prevented the giving in payment to replace the wife's paraphernal effects alienated during marriage. Article 2446 C. C. expressly authorizes the giving in payment, when the spouses are judicially separated in property; and to entitle her to this separation she must allege and prove the embarrassment of the husband.

Neither is there any force in the objection that the wife assumed the payment of a mortgage which the Citizens' Bank had on the property transferred to her. She took the property *cum onere* in payment of her claims. The plaintiffs, at least, have no interest to raise that question.

It is therefore ordered that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant and appellant, rejecting the plaintiffs' demand with costs in both courts.

Rehearing refused.

No. 5648.

MRS. A. M. BARROW et al. v. J. H. STEVENS, Sheriff, et als.

By the marriage contract of plaintiff with her husband, the community was modified so as to exclude the Blackwater plantation and its fruits from the community. This was permitted by article 2421 C. C. The cotton seized was raised on the plantation, and the horses also seized were by destination a part of the Blackwater plantation. Hence the injunction was lawfully taken and must be perpetuated.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J. Samuel J. Powell*, for plaintiffs and appellants. *W. W. Leake*, for defendants and appellees.

LUDELING, C. J. In 1869 the plaintiff was married to C. M. Barrow, the defendant in execution. Just before their marriage they entered into a marriage contract in which it was stipulated that the plaintiff should retain the control and administration of her property, and it was particularly stipulated that "the Blackwater plantation and its revenues should in no manner be subject to the debts of the husband." In 1874, under an execution against C. M. Barrow, ten bales of cotton and two horses were seized as his property. The plaintiff enjoined the sale, claiming that the cotton was raised on the Blackwater plantation, and that the horses were purchased with her money for the use of the place, to which they were attached.

The injunction was dissolved with damages on the ground that the

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cotton and horses belonged to the community of acquets and gains. The plaintiff appealed.

The evidence shows that the cotton was raised on the Blackwater plantation, and that the mare was bought for the use of the place with the means of the wife, and the other horse was the foal of said mare, raised on the place. The question for decision is, was the Blackwater plantation, or the cotton raised on it, community?

We think not. By the marriage contract the community was modified so as to exclude the Blackwater plantation and its fruits from the community. This was permitted by article 2421 C. C. The horses were by destination a part of the Blackwater plantation.

It is therefore ordered that the judgment of the lower court be annulled, and that there be judgment perpetuating the injunction, with costs of both courts.

Rehearing refused.

No. 5569.

SUCCESSION OF WILLIAM BOBB—ERNEST MERILH v. W. L. HODGSON,
on Injunction herein and on Opposition to Application for Dative
Executor.

The motion to dismiss is overruled. The questions at issue in this case are not of ordinary but of probate jurisdiction, and article 88 of the constitution provides that in all probate matters, when the amount in dispute shall exceed five hundred dollars exclusive of interest, the appeal shall be directly from the parish to the Supreme Court.

In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in this case, because it is a power essentially necessary in the settlement of successions, and as an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

A sale *a la folle enchere* is a lawful sale which the parish court may make in the exercise of its probate jurisdiction; and an injunction of a sale of this character is as much probate in nature as an injunction of the first sale, or the first offerings.

Service of the order to give security was made in this case upon the attorney at law of the testamentary executor, said executor being at the time absent from the State. This is sufficient.

When the testamentary executor of the deceased fails to give security, or from any other cause can not discharge the duties of his office, the judge must appoint the public administrator of the parish. The act of 1870, establishing the office of public administrator, repeals former laws on the subject.

A PPEAL from the Parish Court, parish of Jefferson. *Hyman, J. C. E. Schmidt* and *N. Commandeur*, for plaintiff in injunction and defendant in opposition, appellants. *R. Shackleford*, for defendant in injunction and opponents, appellees.

ON MOTION TO DISMISS.

WYLY, J. In the succession of William Bobb, the parish judge ordered the sale of two hundred and twenty shares of stock of the

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Louisiana Ice Company belonging to said succession. Ernest Merilh became the purchaser at the sale, and failing to pay over the price, \$3905, was ordered by the court in a proceeding by rule to comply with his bid. Failing to do so, the defendant, an auctioneer, charged with the duty of selling the property, proceeded to sell the stock *a la folle enchère*, when the plaintiff sued out an injunction to restrain the sale, on the grounds stated in the petition. The court dissolved the injunction, and plaintiff appeals.

The defendant moves to dismiss this appeal, because the questions at issue are of ordinary and not probate jurisdiction; that an appeal will lie to the district court, but not to the Supreme Court in a case like this.

Article 87 of the constitution provides among other things that: "All successions shall be opened and settled in the parish courts." * *

Article 83 provides that "In all probate matters, when the amount in dispute shall exceed five hundred dollars, exclusive of interest, the appeal shall be directly from the parish to the Supreme Court."

In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in the case at bar, because this is a power essentially necessary in the settlement of successions. As an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

A sale *a la folle enchère* is a lawful sale which the parish court may make in the exercise of its probate jurisdiction; and an injunction of a sale of this character is as much probate in nature as an injunction of the first sale, or the first offerings.

In either case the proceeding has a probate character, because the power exercised is essential to the settlement of the succession.

The motion is therefore denied.

ON THE MERITS.

TALIAFERRO, J. The transcript contains the proceedings had in two distinct cases, one of which is an injunction suit, and the other an opposition to an application for the dative executorship of the succession of William Bobb. Much of the evidence offered in the latter case having been introduced in the former, it was agreed by the parties that one transcript would suffice for both cases.

In the first of these cases, Ernest Merilh enjoins the execution of an order of the court condemning him to comply with the terms of adjudication to him of two hundred and twenty shares of the capital stock of The Louisiana Ice Manufacturing Company, sold at public auction

at the instance of the executors of William Bobb, on the twenty-seventh of October, 1874. Merilh, it appears, after purchasing the stock of the estate at this sale, declined paying for it on the ground that the estate of Bobb was without an executor; that Widow Bobb, who had been appointed executrix, and William Bobb, executor, had become *functi officio*, from their failure to give security for the faithful discharge of their duties, which security they had been required to give by an order of court rendered upon the sworn application of A. Roche-reau & Co., creditors of the estate to a large amount; that he could not safely make the payment of the sum bid by him at the sale of the stock except to one authorized to receive and give acquittance. We find from the record that the order for the executors to give security was rendered on the twenty-ninth of October, 1874; that the second sale of the stock at the *folle enchère* of Merilh was advertised by the auctioneer to take place on the twelfth of December following. The service of the order requiring the executors to give security was made, as contended by the plaintiff, on the third of November following the order, so that the thirty days within which the executors were required to furnish security, expired on the third of December, and consequently the executors having failed to comply with the order, there was no executor in office on the twelfth December, the day in which the second sale was advertised to be made. It is further contended on the part of the plaintiff that he had ten days after the rendition of the judgment on the thirtieth of November, ordering him to comply with the terms of sale, within which to take a suspensive appeal, as that judgment required a specific performance, and consequently the auctioneer could not legally advertise the second sale until after the expiration of that delay. The plaintiff states in his own testimony that he was satisfied with the title to the stock, and that he had on deposit in the Canal Bank thirty-nine hundred and five dollars, the price of the adjudication, to pay for it, and introduced in evidence his bank book to show it. He states further, that when called upon by the auctioneer to make payment, he told him he would wait ten days to make payment, as Mr. Bobb had in the mean time to give security.

In order to determine this controversy it is important to inquire whether the service of the order to give security was properly served upon Charles T. Bobb, the executor. The judge *a quo* decided that he was not legally cited, and therefore he was not divested of his office, although the executrix was divested, as personal service was made upon her. Service in the case of the executor was made upon his attorney at law, the executor being at the time absent from the State.

The article 1677 of the Revised Civil Code, making it obligatory upon executors to give security in certain cases, declares that: "It

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shall be the duty of the judge, without further proceeding or delay, to issue his order commanding the testamentary executor to give the required security within thirty days from the service of the order. Should the testamentary executor, if present in the parish, or in his absence, his agent or his attorney at law, fail to furnish the required security within the delay allowed, it shall *ipso facto* work an immediate removal of the testamentary executor, and the judge shall appoint a dative testamentary executor."

The purpose of the law seems clearly to be that in the absence of an executor who has been ordered to furnish security within thirty days, his agent or his attorney at law may provide the security for him. A service or notice of the order to his agent or his attorney at law would seem to be equivalent to notice to himself. The plaintiff, moreover, holds that notice served personally upon Mrs. Bobb, the executrix, exercising jointly with him the functions belonging to the office of executor, was sufficient notice to him; that service of the order requiring both executors to furnish security, made upon one of them, present in the State, was a sufficient service of the order on both. However this may be, we think that the notice in this case made upon the attorney at law of the executor was sufficient. We think, therefore, there was error in the decree of the lower court dissolving the injunction.

The other branch of this case constitutes the opposition of Mrs. Bobb and Charles P. Bobb to the application of Pierre Crabites to be appointed dative executor of William Bobb, deceased. This application is predicated upon the assumption that the executor and executrix named in the will were divested of their offices on the third day of December, 1874, as on that day the thirty days expired within which they were ordered to furnish security, and no compliance with the order was made by them. The applicant, Crabites, filed his petition to be appointed executor on the fifth of December, 1874, alleging himself to be a member of the firm of A. Rochereau & Co., who are creditors of the estate of William Bobb in a sum exceeding ten thousand dollars. His application was opposed by the Widow Bobb and Charles P. Bobb on these grounds:

First—That opponents are the testamentary executors of the decedent.

Second—That they have not been removed from said office by operation of law or otherwise.

Third—That the order of the twenty-ninth of October, 1874, requiring them to give security, had never been served on them in the manner required by law.

Fourth—That if they should fail, when legally served, to give the security, then the succession would have to be placed in the hands of the public administrator as dative executor.

Fifth—That the applicant is not a creditor of the succession, and has no right to the administration thereof, even if a creditor.

The opposition of Charles P. Bobb to the appointment of Crabites was maintained, and the application of the latter was rejected, and thereupon he appealed.

The first three grounds have been considered. The fourth, we conclude, will preclude the applicant from succeeding to the office of executor. The act of 1870, establishing the office of public administrator, section 3, provides: "That in all testate successions, when from any cause the executor can not discharge the duties of his office, the judge shall appoint the public administrator of the parish dative testamentary executor."

This act repeals former laws on the subject, and restricts the judge in making appointments of dative testamentary executors to the public administrator. The plaintiff's application must therefore be rejected.

It is therefore ordered that the judgment of the lower court dissolving the injunction be annulled and reversed. It is ordered that the injunction be perpetuated. It is ordered further that the judgment rendered on the opposition of Mrs. Bobb and Charles P. Bobb, to the application of P. Crabites to be appointed dative testamentary executor, so far as it decrees in favor of Charles P. Bobb, and retains him in the office of executor, be annulled and reversed, and that in other respects it be affirmed. It is further ordered that the costs in the injunction case be paid by the defendant and appellee, and the costs of the application for the office of dative testamentary executor be paid by the applicant.

WYLY, J., *dissenting*. If the bidder at an auction sale refuses to pay the price of adjudication, as Merilh did in this case, the auctioneer is authorized to sell the thing, after a delay of ten days, at his risk. Revised Code, article 2611. The order requiring Merilh to comply with his bid, obtained from the court at his request, was unnecessary. It was the duty of Merilh to comply with his bid. As the auctioneer had the right to make the sale he had authority to receive the price and convey the thing to the purchaser. The only interest Merilh had was to get a title to the stock of the Louisiana Ice Company adjudicated to him. He was utterly without interest to raise a controversy in regard to the title of the testamentary executors to their office. There is no doubt that the auctioneer could have given him a good title; and in my opinion this controversy raised by him is irregular and officious.

I dissent in this case.

Josephine H. Ames v. Hale.

No. 4086.

JOSEPHINE H. AMES v. JAMES HALE.

In this instance there are two acts introduced which must be considered as parts of a whole and which were intended to be a full and final settlement of all the business relations of the parties. Plaintiff can not separate the different portions of this transaction, adhering to those parts which are favorable to her and repudiate those which she considers unfavorable. She must, unless she had shown better reasons than she has, take all or leave all.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. D. C. Labatt*, for plaintiff and appellant. *Lea, Finney & Miller*, for defendant and appellee.

MORGAN, J. Thomas Hale seems to have had many transactions with James Hale, resulting in an indebtedness from Thomas to James.

James Hale was the legatee of Peter Hale, to whom Thomas Hale owed a sum exceeding \$90,000, exclusive of interest.

Thomas Hale died. His succession is represented by his widow, the plaintiff, as widow in community, executrix of his will, and tutrix to their minor children.

On the sixteenth of December, 1867, plaintiff presented a petition to the Judge of the Second District Court of New Orleans, in which she alleged that the debt due to James Hale, as the legatee of Peter Hale, amounted to \$125,000; that the debt was secured by mortgage on certain property belonging to her deceased husband which had, a short time before, been appraised at \$36,000; that James Hale also had a claim against her deceased husband for \$25,000, the price of a house in Matamoras, sold by him to her husband. She represented that James Hale had offered to accept in payment of both these claims, amounting together to \$150,000, the property mortgaged to secure the amount due to Peter Hale. She averred that this settlement would be greatly to the interest of the succession which she represented, and she prayed that a family meeting, composed of the friends of the minors, might be convened for the purpose of giving their assent thereto. The family meeting was held and they approved of the proposed arrangement. Their proceedings were homologated, and in accordance with their recommendation the property mortgaged was, by public act, passed on the twenty-first of December, 1867, transferred to James Hale, who gave a full and entire discharge of the amount therein expressed. Thus with property estimated at \$36,000, the succession was relieved of an indebtedness exceeding \$150,000.

On the twenty-fifth of May, 1861, Thômas Hale, by public act, acknowledged himself indebted unto James Hale in the sum of \$60,000, for which he furnished his three promissory notes for \$20,000 each, payable in one, two and three years after date. To secure their payment he mortgaged certain valuable property in this city.

On the twenty-first of December, 1867, the plaintiff, acting in her capacity as widow in community, testamentary executrix, and tutrix to her minor children, and the defendant, appeared before a notary public, and there she acknowledged that there remained due to the defendant, on account of the indebtedness above described, \$24,309 70 in gold, and the defendant, declaring that he was desirous of facilitating the plaintiff and the heirs of her late husband in the liquidation of the above mentioned debt, agreed to postpone the payment of the same so as to make the sum due payable in two installments, one of \$12,154 86 payable in four years, and the other for a like sum payable in five years from the twenty-eighth November, 1867, the indebtedness to bear interest at the rate of eight per cent. per annum, payment of the interest for the first two years being postponed until the twenty-eighth November, 1869.

It will be observed that the two notarial acts between the parties were drawn up by the same notary and signed on the same day; that on that day the widow in community and the succession of Thomas Hale were indebted unto the defendant in a sum exceeding \$175,000, and that the whole of it was reduced to \$50,000, the payment of \$26,000 being postponed for four years.

The evidence in the record satisfies us that these settlements were the result of long negotiations between the parties, in which the plaintiff was represented by able and conscientious counsel; that the two acts must be considered as parts of a whole, and that they were intended to be a full and final settlement of all their business relations. That the settlement was in the aggregate largely beneficial to the plaintiff and to the interests which, as executrix and tutrix she represented, does not, we think, admit of a doubt.

Two years after these transactions took place the plaintiff instituted this suit. She seeks to reform the last settlement, in which she acknowledges an indebtedness of \$24,309 71, alleging that the amount due, at the time the settlement was made, was only \$8603 65. The excess over this sum being composed of a debt of \$8118 26, which, she avers, was prescribed, and the balance being composed of compound interest. She avers that she was misled into including the above sums in her settlement through error of law and fact, and by the frauds and deceit of the defendant.

We are satisfied, from an attentive examination of the record, that the settlement which is now attacked was part of the general settlement which both plaintiff and defendant intended should be had of all matters connected with the indebtedness of the succession of Thomas Hale to the defendant, and that the two acts relating thereto, passed on the same day, are, indeed, but one act. We are also satisfied that

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the plaintiff knew exactly what she was doing when she signed the same; that the charges of fraud and deceit which she makes against the defendant are without any foundation to rest upon, and that the transaction, by which the succession was released from a very large debt, was altogether in the interest of herself and her minor children.

We do not think that she can separate the different portions of this transaction, adhering to those parts which are favorable to her and repudiating those portions which she considers as unfavorable. She must, we think, take all or leave all.

Judgment affirmed.

No. 5621.

SUCCESSION OF STEPHEN DUNCAN LINTON.

The evidence showing that Linton resided in France, when and where he died, and that the only real estate he owned in Louisiana was situated in Rapides, his succession was properly opened in that parish.

Heirs who accept with the benefit of inventory, have no right to be put in possession of the property, until after the administration thereof is closed.

A PPEAL from the Parish Court, parish of Rapides. *W. F. Blackman*, judge *ad hoc*, in the place of Judge Daigre, recusing himself. *T. C. Manning*, for the heirs of Linton, appellants. *R. J. Bowman*, for public administrator, appellee.

LUDELING, C. J. It appears that in December, 1867, Stephen D. Linton died in France; that he left a plantation situated in Rapides parish; that in the year 1868, C. M. Calvit applied to be appointed administrator of Linton's succession. Oppositions by creditors and the public administrator, were made to said application, and in 1871 O. K. Hawley, public administrator, was appointed.

In 1872 the sisters of Linton, and residents of France, allege that they have accepted said succession with benefit of inventory; that the said Linton was not a resident of Rapides, but of New Orleans, at the time of his death, and that the court of probates of Rapides had no jurisdiction over the succession. They pray that the order appointing the public administrator be set aside. *Pendente lite*, Hawley died and J. M. Wells, Jr., was appointed to succeed him as public administrator. The sisters of Linton filed what they called an opposition to the appointment of J. M. Wells, Jr., public administrator, on the ground that the court of Rapides was without jurisdiction. They further alleged that, should it be held that Rapides was the proper place to open said succession, they are beneficiary heirs, and that T. C. Manning is their attorney in fact. They pray to be recognized as beneficiary heirs, that

Succession of Linton.

the order appointing the public administrator be annulled, and that the property be delivered to them.

Two questions are presented for our decision :

First—Is Rapides the place where the succession of Linton should have been opened ?

Second—Can the heirs, who accept with benefit of inventory, take the property of the succession from the public administrator before his administration has been closed ?

First—The evidence shows that Linton resided in France when he died, where he died, and that the only real estate he owned in Louisiana was situated in Rapides. The succession was properly opened in Rapides. C. C. 935.

Second—Heirs who accept with the benefit of inventory, have no right to be put in possession of the property, until after the administration thereof is closed. C. P. 976; 2 La. 299; 6 La. 212; 3 An. 502; 19 An. 293; 21 An. 364; 7 R. 42; 10 R. 457; 12 R. 333.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 4381.

LAGAN & MACKINSON v. GEORGE D. CRAGIN.

If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction, which is proved in this case.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Bentinck Egan*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendant and appellant.

MORGAN, J. The defendant is sued for \$523 12, for labor and materials furnished in making repairs to and fitting up the machinery on two plantations alleged to be owned by the defendant, the work having been done at the instance and request of the defendant through his agent and manager, O. P. Fisk, and also for labor and materials furnished in making repairs on the steamer Favorite, also alleged to belong to the defendant. They allege that the work and materials furnished by them were necessary to fit up the machinery used in the manufacture of sugar on the defendant's plantations, in order to take off the crop on the same. Defendant first filed a general denial. In a supplemental answer he denies that Fisk had any authority to bind him; that he had any authority to purchase machinery or to purchase

materials, or to make repairs, or to employ the plaintiffs to put up and change the machinery on his plantation, or to contract with any one for the same.

He further avers that the work which was done was badly done; that he has suffered loss in consequence thereof; that it was unnecessary, and injured rather than benefited him, and that after the "so called" fitting up of the machinery it was not as good as it was before. He denies that he ever owned the steamboat Favorite; that the expense of the repairs thereto was a debt due by Fisk.

From the testimony of the defendant it appears that Fisk was his partner. The plantations upon which the work was done were purchased by the defendant in his individual name, but when they paid for themselves they were to be owned jointly by defendant and Fisk; Fisk was to manage them, and the profits and losses were to be equally divided. This made them ordinary partners.

"Ordinary partners are not bound *in solido* for the debts of the partnership, and no one of them can bind his partners, unless they have given him power to do so, either specially or by the articles of partnership." C. C. 2872.

"In the ordinary partnership each partner is bound for his share of the partnership debt." C. C. 2873.

"If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction." C. C. 2874.

There is no evidence in the record that Fisk was authorized to contract for Cragin, the defendant, and the question we have to determine, under the articles of the Code above cited is, whether the work done benefited the partnership.

We think it did. The work was certainly done, and the machinery, etc., charged for is on the plantations.

As to the steamboat, we think the record shows that the defendant knew it had been purchased, and that it was being used for the benefit of the partnership. Plaintiff is, we think, entitled to recover from the defendant one-half of the amount claimed against him.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended so as to reduce the same from \$5233 12 to \$2616 58, and that as thus amended it be affirmed; the costs in the lower court to be paid by the appellant, the costs in this court to be paid by the appellee.

Rehearing refused.

No. 4384.

HEIRS OF JOHN SLIDELL v. GERMANIA NATIONAL BANK.

The plaintiffs in this suit are not attacking the proceedings and judgment in confiscation pronounced by the United States Court. They recognize the validity thereof, but say that the effect of that judgment and the sale thereunder ceased at the death of their ancestor John Slidell, and that it was only his life estate that was disposed of. This is correct, and has been frequently reaffirmed by the Supreme Court of the United States.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Clarke, Bayne & Renshaw*, for plaintiffs and appellees. *Hawkins, & Tharp* and *Billings & Hughes*, for W. R. Fish, called in warranty, defendant and appellant. *C. L. Buddeck*, for defendant, Germania National Bank.

HOWELL, J. The plaintiffs, as heirs of John Slidell, sue for certain property in the possession of the Germania National Bank, and the rents thereof from thirtieth July, 1871, the date of the death of their ancestor. The bank set up possession under a lease from W. R. Fish, the owner, and called him in warranty. Fish pleaded as an exception his purchase at marshal's sale under a valid judgment of condemnation and confiscation, rendered by the United States District Court for the eastern district of Louisiana, in the suit of the United States v. 844 lots and 10 squares of ground, which was instituted and prosecuted under and by virtue of an act of Congress, approved seventeenth July, 1862, entitled "an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes," which judgment and the proceedings and sale thereunder are still in full force and effect and can not be attacked collaterally in this suit, and that the State court is without jurisdiction to question the validity of warrantor's title or to review the decree of proceedings in the said United States Court under which he holds.

There was judgment in favor of plaintiffs and Fish appealed. His counsel says: There is but one question to be considered in determining the case, to wit: Have the State courts any power or right to inquire into, modify or limit the decree of the District Court of the United States, sitting as a prize court? And he invokes the decision of the United States Supreme Court in the case of the United States v. T. A. Clark, executor of John Slidell, and the heirs of John Slidell, affirming the judgment of the United States District Court in said confiscation proceedings as final and vesting in the warrantor a title in fee simple to said property.

Taking this as the only question, we are unable to concur in this position of counsel. The plaintiffs are not attacking the proceedings and judgment in confiscation. They recognize the validity thereof, but say that under the said confiscation law and the decision of the

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United States Supreme Court in the cases of *Bigelow v. Forest*, 9 Wall. 339, and *Day v. Tricou*, 18 Wall. 162, interpreting the said law, the effect of that judgment and the sale thereunder ceased at the death of their ancestor John Slidell, and that it was only his life estate in this property that was acquired by Fish. This is correct, and has been frequently reaffirmed by the United States Supreme Court. In the case of the *United States v. Clark*, executor, et als., invoked by the appellant, the sufficiency of the information, the regularity of the proceedings, the jurisdiction of the district court and the effect of the amnesty proclamation were considered and passed on. The question in this case was not raised therein, but in the case of *Macuard v. United States*, decided at the same time as the said confiscation case, the Supreme Court in express terms recognized the doctrine in *Bigelow v. Forest*, and *Day v. Micou* as applicable to the purpose and effect of the sale of Slidell's property.

Judgment affirmed.

Mr. Justice Taliaferro dissents.

No. 5663.

WILLIAM DOUGHTY v. THE SHERIFF et als.

It is manifest that the act 33 of the acts of 1865, entitled "An Act to exempt from seizure and sale a homestead and other property," was intended to apply to seizures under execution after the passage of the law, regardless of the period when the debts were contracted, upon which the judgments were rendered. When the authors of the statute undertook to enumerate the claims which they desired exempt from the operation of this law, the presumption is they mentioned all that they intended.

The law is unambiguous, and, under pretext of a construction, this court can not rightfully apply a limitation upon its operation, for this would be virtually enacting an amendment to the law, or exercising legislative powers.

If the defendants, prior to the enactment of the homestead act of 1865, had acquired a privilege or mortgage on the property in question, that right would not be impaired by the law. But this court has never decided that a judgment rendered after the passage of the homestead law, on an ordinary debt existing previously, is exempt from the operation of said homestead law.

A state has a right to pass a homestead law of the kind mentioned in this suit, and its operation against an ordinary creditor whose claim existed before its passage, in no manner contravenes the provision of the constitution of the United States prohibiting a State from enacting a law impairing the obligations of contracts.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J.* Jury trial. *D. J. Wedge* and *T. A. Moore*, for plaintiff and appellee. *W. F. Kernan*, for defendant and appellant.

WYLY, J. Plaintiff enjoined his judgment creditors from selling one hundred and sixty acres of the land seized by them, claiming it as his homestead under act 33 of the acts of 1865.

The defendants, Chase and Offut, obtained their judgments long after the passage of the homestead law, but they insist that as the

debts on which their judgments are based, were contracted prior to the enactment of said law, the statute in question was not intended to apply to them; that laws should never be considered applicable to cases arising before their passage, unless the Legislature have in express terms so declared; that in the case of *Robert v. Coco*, 25 An. 199, relied on by plaintiff, the question was whether the homestead act of 1865 was constitutional, and it was held to be constitutional; that defendants make no such issue in this case; they say the law is constitutional, but contend the act does not apply to obligations contracted before its passage. They also contend in their brief that this homestead law is similar to the act of 1852, allowing the necessitous widow and her minor children one thousand dollars out of the estate of the deceased husband and father, and that statute has been construed in that way by this court in 10 An. 510, 12 An. 553, and in other cases.

Act 33 of the acts of 1865, entitled "An Act to exempt from seizure and sale a homestead and other property," provides "That in addition to the property now exempt from seizure and sale under execution, one hundred and sixty acres of land and the buildings and improvements thereon occupied as a residence, and *bona fide* owned by the debtor having a family or mother, or father, or person or persons dependent on him for support; * * * provided the property herein declared to be exempt from seizure and sale does not exceed in value two thousand dollars; * * * provided further, no debtor shall be entitled to the exemption provided for in this section whose wife shall own in her own right, and be in the actual enjoyment of property worth more than one thousand dollars; provided further, that no property shall by virtue of this act be exempt from sale for non-payment of taxes or assessments levied pursuant to law, nor for debt contracted for the purchase price of said exempted property, nor for money due for rents bearing a privilege on said property under existing laws."

It is manifest that this statute was intended to apply to seizures under execution made after the passage of the law, regardless of the period when the debts were contracted, upon which the judgments were rendered. The express reservation from the operation of this law of claims for taxes and of the debt for the purchase price of the exempted property, and money due for rents bearing a privilege on said property, carries with it the implication that no other debts were intended to escape the operation of this law, it matters not when contracted. When the authors of the statute undertook to enumerate the claims which they desired exempt from the operation of this law, the presumption is they mentioned all that they intended.

There are several provisos or limitations mentioned in the law, and we do not feel authorized to add another, to the effect that it shall not apply to judgments rendered after its passage, on ordinary claims existing previously.

The law is unambiguous, and under pretext of a construction this court can not rightfully place a limitation upon its operation, for this would virtually be enacting an amendment to the law, or exercising legislative powers.

In *Robert v. Coco*, 25 An. 199, the question was whether the homestead act applied to the judgments obtained after its passage on ordinary debts existing previously, and if so, whether the law was constitutional. The court held the law applicable, and also that it is constitutional.

Here the learned counsel for the defendant insists that the law is not applicable; he concedes that it is constitutional. The case at bar is identical with that of *Robert v. Coco*, and it must be decided in the same way. This court has often decided that privileges and mortgages can not be defeated by subsequent legislation of this character, because they are accessory obligations and are protected by that provision of the constitution of the United States prohibiting a State from enacting a law impairing the obligations of contracts. If defendants, prior to the enactment of the homestead act of 1865 had acquired a privilege or mortgage on the property in question, that right would not be impaired by the law. It could be enforced notwithstanding the enactment.

But this court has never decided that a judgment rendered after the passage of the homestead law, on an ordinary debt existing previously, is exempt from the operation of said homestead law. The homestead act was not intended to impair acquired rights and to take away all remedies to contracts.

Its object was to uphold the agricultural interest of the State, to reserve from seizure a small piece of land, certain implements, work-animals, and provisions, in order that the debtor may continue his agricultural pursuit for the support of his family, for the payment of his debts, and for the discharge of his duties as a tax payer and citizen. Whatever sum he acquires beyond the exempted property is liable to the pursuit of his creditors, and whenever he ceases to occupy the exempted property as a homestead, it also becomes liable and can be seized. We regard the homestead law as but a modification of the remedy which the State, interested in the support and welfare of her citizens and interested in fostering agricultural pursuits, developing her own resources, had the right to pass, and in doing so she impaired no acquired rights of the defendants.

The restrictive clause of the constitution of the United States was never intended to paralyze the arm of industry, or to prevent a State from developing her own resources by fostering agricultural pursuits.

Much stress is laid on an *obiter dictum* in the case of Sabatier et al. v. Their Creditors, 6 N. S. 585, to the effect that a law passed after a contract which would exempt all the property of the obligor from payment of the debt, would be unconstitutional; it would be equally so if a portion was placed out of reach of execution, provided the portion left was not sufficient to satisfy the debt. This remark was entirely unnecessary to the solution of the question in that case, which was whether in a *concurso* in a case of insolvency, an irregular depositor who had a privilege at the time of the contract of deposit, lost it by the subsequent repeal of the law allowing a privilege to an irregular depositor.

The conclusion of the court was entirely correct; the law in force at the time of the irregular deposit gave a privilege which was an accessory obligation that could not be impaired by the subsequent repeal of the law. This court has ever held that real rights, mortgages and privileges, can not be impaired by subsequent legislation, because they are necessary obligations. But defendants who were ordinary creditors had acquired no real rights on the property in question, and the exemption thereof by the State from seizure, in no sense impaired the obligations of a contract detrimental to defendants.

In the cases of the succession of Taylor, 10 An. 510, and Milne v. Schmidt, 12 An. 553, this court construed the act of 1852, allowing the necessitous widow one thousand dollars out of the estate of her deceased husband, as not applying to creditors whose debts existed prior to the passage of the law.

Here we find the law unambiguous, containing certain exceptions or limitations to its operation, and under pretext of a construction this court can not rightfully add another exception or limitation to its operation; we find no authority to say that its operation must be restricted in favor of ordinary creditors whose claims existed before the passage of the law.

As the defendants concede the constitutionality of the law, we deem it unnecessary to review the decisions of the Supreme Court of the United States, and to pursue the argument showing that a State has the right to pass a homestead law of the kind before us, and that its operation against an ordinary creditor whose claims existed before its passage, in no manner contravenes the provision of the constitution of the United States, prohibiting a State from enacting a law impairing the obligations of contracts. 15 An. 153; Cooley's Limitations 288.

It is therefore ordered that the judgment herein in favor of plaintiff be affirmed with costs.

Doughty v. Sheriff et als.

LUDELING, C. J., *dissenting*. Two judgment creditors of W. F. Doughty having caused his property to be seized under executions, he enjoined the sale, on the ground that one hundred and sixty acres were exempt from seizure and sale under the act of the General Assembly commonly known as the homestead exemption law. The creditors averred that their debts existed *before* the passage of said law, and that the law could not have a retroactive effect; and they prayed for the dissolution of the injunction with damages.

There was judgment in favor of the plaintiff, and the defendants have appealed.

The evidence shows that the *debts* existed prior to the passage of the law. The rule is that laws prescribe only for the future, and there is nothing in this law to indicate that the legislators intended that it should have a retroactive effect.

Courts ought not to consider a law applicable to cases which existed before its passage, unless the legislators have clearly indicated that such was their intention. 3 N. S. 270; 7 La. 280; 14 An. 27.

In this case, if the law had expressed that obligations existing before its passage should be destroyed either in whole or in part, the law would have been unconstitutional; and so it would be, if the construction be correct, which is contended for by the plaintiff, that his property is exempted from seizure for the payment of a debt contracted before the law was enacted.

It is the duty of courts to so construe statutes as to give them effect, if possible. And, accordingly, the Widows' Homestead act and the Homestead Exemption law have been interpreted not to apply to obligations which existed at the time said acts were enacted. 10 An. 509, Succession of Taylor; 12 An. 553, Milne v. Schmidt; 20 An. 244, Roupe v. Carradine; 25 An. 142, Mills v. Sheriff et al.

Whatever there is in the opinion in the case of Robert v. Coco, 25 An. 199, which may be in conflict with this view, is not approved.

It is contended by the plaintiff that inasmuch as the debts of the defendants were not secured by a mortgage on his lands, they had no right on the land which could be lawfully exempted by the Legislature from seizure to pay said *debts*, and that said exemption neither impaired the obligation of the contracts nor divested rights.

The *obligation* of a contract is that which the law, in force at the time the contract is made, obliges the parties to do or not to do. The *right* of each is to obtain a performance of what the other bound himself to do. The *remedy* is the *means* or manner provided to enforce this right. But if the remedy or means for enforcing the right be wholly destroyed, the *right* or *obligation* is destroyed, because a legal right is one which can be enforced. C. C. 1757.

Doughty v. Sheriff et al.

I think it is clear that a law passed subsequent to the creation of a debt, which would exempt all of the debtor's property from the payment of his debt, would be unconstitutional; and that it would be equally so if a part of it was placed out of reach of execution, provided the portion left liable was not sufficient to satisfy the debt. 4 Wheat. 122; 8 Wheat. 1; 6 Wheat. 131; 6 N. S. 591.

I can not, therefore, adopt the construction contended for by the plaintiff, and I dissent from the opinion of the court.

No. 5420.

STATE OF LOUISIANA v. GEORGE FRITZ *alias* GEORGE FREY.

Act 124 of the acts of 1874, organizing the Superior Criminal Court gave that court exclusive jurisdiction of this case, and no order of transfer or other decree was necessary to give it jurisdiction.

If a *nolle prosequi* was entered on the first count for "forgery," the forged order was copied in the second count "for publishing as true a forged order for the delivery of goods," and no explanatory averment of the meaning of the words and figures thereof was necessary—the meaning being obvious. The signature of the forged order "Randal & Co., 43 Carondelet street," was sufficient to suggest the name of a firm upon whom the forgery was committed.

It was not necessary to allege that Randal & Co. had goods at the place designated in the forged order.

The averments of the second count were ample to apprise the defendant of the charge against him, and to put him in possession of all information necessary to prepare his defense.

That a new trial and *nolle prosequi* were entered on the first count charging forgery, is no reason why the defendant should escape the verdict and sentence on the second count for a distinct and separate offense.

The new trial and *nolle prosequi*, as to the first count, were entered on the twenty-third of May, 1874; the motion in arrest of judgment, however, was not presented until the twenty-seventh, four days afterward. This court is not prepared to say that the judge *a quo* erred in holding that the motion came too late.

The expression in the decree of the court that "the prisoner having been brought into court, and having nothing to say in arrest of judgment, was sentenced," etc., of course, implies that he was asked if he had anything to say why sentence should not be pronounced against him.

APPEAL from the Superior Criminal Court, parish of Orleans. *Atocha*, J. Criminal case. *A. P. Field*, Attorney General. *J. B. Cotton*, *Alfred Shaw*, for plaintiff and appellee. *J. J. Foley*, for defendant and appellant.

WYLY, J. An information was filed against the defendant containing three counts:

First—Forgery.

Second—Publishing as true a forged order for the delivery of goods.

Third—Obtaining goods by false pretenses.

A *nolle prosequi* was entered as to the third count, and the accused was tried and found guilty on the first and second. The counsel for the defendant moved for a new trial on the following grounds:

First—There was no testimony showing the forged instrument is in the handwriting of the accused, or that it was done by his procuration.

Second—There was error in admitting said forged writing to prove said first count.

Third—The evidence in support of the second count was not sufficient to warrant the jury in returning a verdict of guilty.

A rehearing was granted on the first count, but refused on the second. A *nolle prosequi* was then entered as to the first count, and the accused was sentenced to six years' imprisonment in the penitentiary. He thereupon took this appeal.

Appellant assigns in this court the following errors :

1. There is no order transferring this case from the First District Court to the Superior Criminal Court.
2. The contractions in the writing charged to have been forged in the second count should have been explained by an innuendo or explanatory averment.
3. It should have been averred in said second count what was meant by the contractions Randal & Co.; that is, whether the same meant some juridical person or association whose signature would be effective for the purpose of fraud.
4. It should have been averred in said second count that Randal & Co. had goods at the place designated by the order.
5. The jury, in their finding on the second count, predicated the forgery and guilty knowledge on the first count. A new trial and *nolle prosequi* having been subsequently ordered on the first count, the finding on the second can not stand by itself.
6. There was error in the ruling of the judge refusing to allow the motion in arrest of judgment to be filed.
7. The prisoner was not asked if he had anything to say why sentence should not be passed upon him.

First—Act 124 of the acts of 1874, organizing the Superior Criminal Court, gave that court exclusive jurisdiction of this case, and no order of transfer or other decree was necessary to give it jurisdiction.

Second and Third—The forged order was copied in the second count, and no explanatory averment of the meaning of the words and figures thereof was necessary, the meaning was obvious. The signature to the forged order: "Randal & Co., 43 Carondelet street," was sufficient to suggest the name of a firm upon whom the forgery had been committed.

Fourth and Fifth—It was not necessary to allege that Randal & Co. had goods at the place designated in the forged order. We regard the averments of the second count as ample to apprise the defendant of

State of Louisiana v. Frits *alias* Frey.

the charge against him and to put him in possession of all information necessary to prepare the defense. In the motion for a new trial the only objection to the finding on the second count was the averment that the evidence was not sufficient to warrant the jury in returning the verdict of guilty. The second count, as before remarked, contains all the necessary allegations in a charge for publishing a forged order for the delivery of goods; and the jury, upon facts which we can not revise, returned a verdict of guilty on this count. That a new trial and *nolle prosequi* were entered upon the first count charging forgery is no reason why the defendant should escape the verdict and sentence on the second count, a distinct and separate offense.

Sixth and Seventh—The defendant had the right to file a motion in arrest of judgment, but that right should have been exercised within a reasonable time. The new trial and *nolle prosequi* as to the first count were entered on the twenty-third of May, 1874; the motion in arrest of judgment, however, was not presented until the twenty-seventh, four days afterward. We are not prepared to say the judge erred in holding that the motion came too late.

The decree recites that the accused was brought into court "in the custody of the sheriff to be sentenced on the above charge, and having nothing to offer in arrest of judgment, considering the verdict of the jury herein recorded and section 833 of the Revised Statutes of the State, the court sentenced the said George Fritz *alias* Fry to imprisonment at hard labor in the State penitentiary for a term of six years, and to pay the costs of this prosecution."

The expression "and having nothing to offer in arrest of judgment," of course, implies that the prisoner was asked if he had anything to say why sentence should not be pronounced against him.

Judgment affirmed.

No. 5586.

THE STATE ex rel. P. S. WILTZ, Agent, etc. v. CHARLES CLINTON, Auditor.

The tax collector is entitled to charge \$2 for each deed of sale which he effects, but when one person buys all of a tract of land containing two thousand acres, and gets one deed, the tax collector is not allowed to charge for forty deeds under the supposition that the property has been subdivided into fifty acre lots.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. S. Belden*, for relator and appellee. *Henry C. Dibble*, for respondent and appellant.

LUDELING, C. J. The relator asks for a writ of mandamus to compel the Auditor to issue a warrant on the Treasurer for the amount of

State ex rel. Wiltz v. Clinton, Auditor.

his bill for making sales for delinquent taxes, to wit: \$3451. Proceeding under the act No. 47 of 1873, the tax collector advertised and offered for sale the property of several persons, on account of the non-payment of the taxes; there being no bidders, the property was adjudicated to the State, and the tax collector made one proces verbal of the sale. He sold the property of one hundred and fifty-eight persons, and in the proces verbal he states that the property was subdivided into fifty acre lots, and for each fifty acre lot he charged two dollars, and for notices. We think he is entitled to charge for each deed two dollars, but when one person buys all of a tract containing two thousand acres, and gets one deed, the tax collector is not allowed to charge for forty deeds, under the supposition that the property had been subdivided into fifty acre lots. The charge for notices is not proved. One witness alone swears in round terms to the correctness of the account. That is his opinion only, which is not evidence. We have seen that he was mistaken about the charges for making deeds; and it is more than probable that he is mistaken about the notices also. In many cases the charge is made for four and in others for six notices. We can not imagine why there should be six, or even four, notices in making a tax sale.

It is therefore ordered that the judgment of the lower court be set aside, and that the Auditor be commanded to issue a warrant in favor of the relator for three hundred and sixteen dollars, and that there be judgment of nonsuit for the amount claimed for issuing notices, the costs of the lower court to be paid by the defendant, and the costs of appeal by the relator and appellee.

No. 4367.

MRS. A. LANGSDORF v. S. LE GARDEUR.

The plea of *res judicata* can not prevail, as there was a judgment of nonsuit as to the portion of the claim embraced in this action.

The evidence establishes the lease for the time claimed, but the court erred in granting a privilege, as it is shown that the furniture was moved from the premises two or three months before this suit was brought.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. A. Voorhies*, for plaintiff and appellee. *E. Filleul*, for defendant and appellant.

HOWELL, J. Plaintiff sues for the balance due on a contract of lease and caused furniture to be provisionally seized. The defense is the plea of *res judicata* and the averment that the defendant occupied the premises by the month; that he gave the legal notice before vacating the same; that he tendered the keys and the rent for the month at the

Mrs. A. Langedorf v. LeGardeur.

end of which he moved out, and upon plaintiff's refusing to receive them he deposited them in the court where a suit was pending, and plaintiff has since taken them, and thus acquiesced in the judgment in said suit. A motion was made to set aside the attachment on the grounds that the attachment having been set aside in the suit above referred to there is *res judicata*, that the affidavit is false, and that plaintiff has no privilege.

Judgment was given in favor of plaintiff with privilege, and defendant appealed.

The plea *res judicata* can not prevail, as there was a judgment of nonsuit as to the portion of the claim embraced in this action.

The evidence establishes the lease for the time claimed, but the court erred in granting a privilege, as it is shown that the furniture was moved from the premises two or three months before this suit was brought. It is true that the plaintiff took the money and keys deposited in the first suit, but only after the judgment therein, which awarded her the sum so deposited, and she took the keys upon informing defendant she would rent the house for his benefit, and because the house was left exposed and subject to damage.

It is therefore ordered that the judgment so far as it grants a privilege on the property provisionally seized be reversed and annulled, that the provisional seizure be set aside at the costs of plaintiff, and that in other respects the judgment be affirmed, plaintiff to pay costs of appeal.

No. 5754.

SUCCESSION OF JOHN O'LOGHLEN.

Under article 3252 R. C. C. which says: "The widow or legal representatives of the children shall be entitled to demand and receive from the successor of the deceased husband or father, a sum which, added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars," the proof should have shown that, in this instance, the widow also had no means, or, if she had any, less than one thousand dollars, what it was. Her demand should be rejected on that ground; nor can the demand be made by the attorney for the absent heirs. The legal representatives of the children would be their tutors.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. W. O. Denegre and H. G. Morgan*, for public administrator, appellants. *Hornor & Benedict and W. H. Hunt*, for Bothick et al., creditors of the succession and appellants. *McGloin & Nixon*, for the absent heirs, appellees.

LUDELING, C. J. John O'Loghlen, died at Ocean Springs, Mississippi, leaving a small amount of personal property in New Orleans, which is administered by the public administrator. Having filed his account

Succession of O'Loughlen.

and tableau of distribution, several oppositions were filed, and among them one by the attorney of absent heirs claiming \$1000, under article 3252 R. C. C.

The evidence shows that O'Loughlen left two sons, one living in New York and the other in Ireland, and his widow, who resides in Ohio—none of whom have ever been in Louisiana.

The testimony of one of the sons shows that the children of O'Loughlen have no property, but there is no evidence to show what the circumstances or means of the widow are. The law is that the "widow or legal representatives of the children shall be entitled to demand and receive from the succession of the deceased husband or father a sum, which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars." C. C. 3252. In order to recover under this law the proof should have shown that the widow also had no means, or, if she had any, less than \$1000, what it was. The demand should be rejected on that ground.

Nor can the demand be made by the attorney for absent heirs. The law declares that "the widow or the legal representatives of the children shall be entitled to demand," etc. The legal representatives of the children would be their tutors.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that the oppositions to the account be rejected and that the account of the public administrator be homologated, the costs to be paid by the succession.

No. 5561.

SUCCESSION OF JOSEPH RICARD.

It would be improper to attempt to decide anything in regard to the title of the property in controversy, even if the court had jurisdiction, as the vendee is not before the court, and it would be no less wrong to make an order to put the legatee in possession of property which is shown to have passed out of the succession, and the possessor is not before the court.

It is manifest that the judgment decreeing the title of the property to be still in the succession is wrong, as no such allegation or prayer is made in the petition.

It is equally clear that if it had been made, the parish court would have been *ratione materiae* without jurisdiction to try that question, as the value of the property exceeded five hundred dollars.

APPPEAL from the Parish Court, parish of Lafourche. *Collin, J. John S. Billiu, E. W. Blake*, for plaintiff and appellee. *Pugh & Guion, and L. S. Allain*, for defendant and appellant.

LUDELING, C. J. On the fourteenth of August, 1873, Martial Ricard as legatee under the will of his natural father, and as heir of his

brother Charles, obtained an order against the executor of his father's will to render an account. The account was rendered, and the plaintiff filed an opposition to it. While that suit was pending, he filed a petition praying to be recognized as the sole legal heir of his brother and instituted heir of his father, and to be put in possession of the special legacy made to him by the will.

This demand was opposed by Severin Ricard, the executor, and Joseph Ricard, the brother of the deceased, who claimed to be the sole legal heirs, on the grounds that the plaintiff was only a *status liber* at the date of testator's death, and that he was the natural son of the testator, and could not receive as legatee or inherit from the father.

There was judgment in favor of the plaintiff declaring him a legatee of his father and the heir of his brother, his colegatee, ordering him to be put in possession of the property bequeathed to him and his brother, and declaring the sale made by the executor null and void and the title of the property to be still in the succession.

The only part of this judgment that is seriously opposed in this court is, that the judgment is *ultra petitionem*, and that the parish court was without jurisdiction to try the question of title to property, the value whereof exceeds five hundred dollars, and that the judgment orders that plaintiff be put in possession of property of the estate, which he has judicially admitted had been sold.

The evidence shows that the tract of land bequeathed to plaintiff constituted the principal part, if not the whole, of the property of said succession, and that it had been sold; that the plaintiff had called on the executor for an account, and had filed an opposition to the account, which was still pending. It would be improper to attempt to decide anything in regard to the title to this property, even if the court had jurisdiction, as the vendee is not before the court; and it would be no less wrong to make an order to put the legatee in possession of property, which is shown to have passed out of the succession, and the possessor is not before the court. It is manifest the judgment decreeing the title of the property to be still in the succession is wrong, as no such allegation or prayer is made in the petition.

It is equally clear that if it had been made, the parish court would have been without jurisdiction *ratione materiæ* to try that question, as the value of the property exceeded five hundred dollars. Constitution, article 87.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiff recognizing him as instituted heir of Joseph Ricard and heir at law of Charles Ricard with costs of the lower court, the costs of appeal to be paid by the appellee.

Vinas v. Merchants' Mutual Insurance Company of New Orleans.

No. 2559.

BENITO VINAS v. MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

Article 443 R. C. C. does not protect corporations from civil prosecutions for damages *ex delicto*. Corporations have been held responsible for acts done by their agents *ex contractu* and *ex delicto*.

A corporation may sanction the publication of a libel, and in such case the corporation is the publisher of the libel, and liable in like manner as an individual, not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action.

It is as possible for a corporation as for an individual to act maliciously, to wit: with a bad intent. Accordingly, it has been held that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as might imply malice in law sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. George L. Bright*, for plaintiff and appellant. *A. Voorhies*, for defendant and appellee.

HOWELL, J. This is an action for slander and libel, to which the defendants pleaded the exception of no cause of action, in that "a corporation can not be made responsible for damages *ex delicto*," and they rely on article 443 R. C. C., which says: "A corporation can not commit the crime of treason, or any other offense in its corporate capacity, although its members may be guilty of those crimes in their individual and respective capacities."

This article does not, in our opinion, protect corporations from civil prosecutions for damages *ex delicto*.

In applying the above and the three preceding articles, this court said, in the case of *Etting v. Commercial Bank of New Orleans*, 7 R. 463, cited by defendants: "The true rule seems to be that when the agent, acting in the capacity bestowed upon him by the corporation, and in discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage to an individual, the body corporate is responsible."

That corporations have been held responsible for acts done by their agents, *ex contractu* and *ex delicto*, is shown by numerous reported decisions throughout this and foreign countries.

In *Townsend on Slander and Libel*, section 265, it is said: "If an officer or agent of a corporation is guilty of slander, he is personally liable, and no liability results to the corporation. But as all concurring in the authorship or publication of a libel are alike responsible as publishers, there is nothing to prevent a corporation from being in law the publisher of a libel, and from being held liable as such publisher. A corporation may sanction the publication of a libel, and in such case the corporation is the publisher of the libel, and liable in like manner

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as an individual; not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action. It is as possible for a corporation as for an individual to act maliciously, i. e., with a bad intent. Accordingly, it has been held that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice, in law, sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity."

The allegations of the petition bring this case within this principle, the defamatory expressions being contained in an answer filed on behalf of the defendants in a suit against them.

It is therefore ordered that the judgment appealed from be reversed, that the exception be overruled and the case remanded to be proceeded in according to law. Costs of appeal to be paid by appellees.

No. 3919.

THOMAS G. EGAN v. THE FIREMAN'S INSURANCE COMPANY AND
THE PELICAN INSURANCE COMPANY.

This was merely a case of ordinary reinsurance, no policy being issued, no written agreement being entered into, but the application for reinsurance by the Fireman's Insurance Company being entered in the books of the Pelican Insurance Company, as it is inferred to be the custom among insurance companies in cases of this kind.

If there was a stipulation *pour autrui*, or a contract whereby the Pelican Insurance Company assumed the obligation of the Fireman's Insurance Company, the plaintiff can not enforce it, because said agreement was not in writing, and the law is that the promise to pay the debt of another can not be proved by parol evidence.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Budd & Grover*, for plaintiff and appellee. *Julien Michel*, for defendant and appellant.

WYLY, J. The plaintiff, in 1869, insured a lot of groceries and some furniture in a building occupied by him, in The Fireman's Insurance Company for \$1200, paying the premium, \$24.

Within twelve months thereafter, and during the continuance of the policy, a fire occurred and the property insured was destroyed.

Plaintiff then sued on the policy, The Fireman's Insurance Company for the loss sustained by him, which is proved to be equal to the amount of the insurance. He also, in the same suit, sued The Pelican Insurance Company for the same amount, alleging that they assumed the risk or obligation of The Fireman's Insurance Company to plaintiff.

The court came to the conclusion that the case was fully made out against The Fireman's Insurance Company, and that the contract be-

Egan v. Fireman's Insurance Company and the Pelican Insurance Company.

tween The Fireman's Insurance Company and The Pelican Insurance Company was not one of ordinary reinsurance; but was an assumption by the latter of all the risks taken by the former, to facilitate a liquidation of affairs; and it was made not to secure The Fireman's Insurance Company merely, but for the use and benefit of those to whom that company had issued the policy. That it was a stipulation *pour autrui*, of which the third parties could avail themselves according to the articles 1890 and 1902 of the Revised Code.

Judgment was accordingly rendered against each of the defendants for \$1200, the amount of the insurance. The Pelican Insurance Company alone has appealed.

There are two reasons why the judgment against the appellants should be reversed:

First—The evidence shows that this was a case merely of ordinary reinsurance, no policy being issued, no written agreement being entered into, but the application for reinsurance by The Fireman's Insurance Company being entered in the books of The Pelican Insurance Company, as we infer the custom is among insurance companies in cases of this kind.

Second—If there was a stipulation *pour autrui*, or a contract whereby The Pelican Insurance Company assumed the obligation of The Fireman's Insurance Company, the plaintiff can not enforce it, because said agreement was not in writing, and the law is that the promise to pay the debt of another can not be proved by parol evidence.

It is therefore ordered that the judgment herein against the appellants, The Pelican Insurance Company, be annulled, and that plaintiff's demand as to them be rejected with costs of both courts.

No. 4439.

NICOLSON & Co. v. CITIZENS' BANK.

Plaintiffs, in this instance, rely on a judgment in their favor, which, however, did not grant them a privilege on a certain property belonging to Stinson, although claimed in that suit. They rested satisfied with the judgment and had it recorded. The consequence of their acquiescence in that judgment is the loss of their privilege so far as third parties are concerned. But even if that judgment did not settle the claim of plaintiffs adversely to them, they have lost their privilege by failing to reinscribe it within ten years. The privilege was recorded in 1860; the judgment was recorded in 1861, and there had been no reinscription thereof in 1872, when defendants foreclosed their mortgage.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard*, J. *Hornor & Benedict* for plaintiffs and appellants. *A Pitot*, for defendants and appellees.

LUDELING, C. J. The petition alleges that "on February 8, 1870, Nicolson and Company, in liquidation, filed their petition, alleging that under a notarial contract with the city of New Orleans they had

paved Camp street with square block stones, and especially in front of the property on the corner of South and Camp streets, known as the Verandah hotel, the property of Joseph Stinson, and received from said city on January 30, 1860, a certificate of the amount due them for said work, amounting to \$979 05, which was duly recorded in the mortgage office on the fourth of March, 1860, against the said recorded owner of said property; that subsequently they instituted suit thereon and obtained judgment, which was also duly recorded in said mortgage office, and their privilege operated against said property as superior in rank to all mortgages resting thereon; that by virtue of a seizure and sale issued at the instance of the Citizens' Bank on a mortgage by it held, the Citizens' Bank became the purchaser of said property, and refused to pay to your petitioners the amount of their judgment and privilege as aforesaid, or to surrender the property to be subjected to your petitioners' claim: and they pray accordingly."

The Citizens' Bank answered that it had the first mortgage on the property; that the privilege claimed by the plaintiffs never existed; that if the privilege ever existed the claim was novated and the privilege was lost, and that the privilege had already been rejected in a suit between the plaintiffs and Stinson, the former owner of the property.

It appears that Nicolson & Co. took the note of Stinson for the amount of their claim for paving; that they had their claim recorded in the Book of Records, in March, 1860; that they sued Stinson on the said note and claimed a privilege on the property, and there was a judgment in their favor against Stinson for the amount of the note or claim, but the judgment said nothing about the privilege, and this judgment became final. The judgment was rendered in February, 1861, and was duly recorded. The bank's mortgage was recorded in February, 1837.

It is evident, therefore, that the bank's mortgage outranks the mortgage of the petitioners, and that their pretensions to be paid by preference can only be maintained by showing that they have a privilege on the property sold.

Privileges are *stricti juris* and must be clearly established by those who assert them. Pretermitted the expression of an opinion as to whether or not Nicolson & Co. novated their claim for paving by taking the promissory note of Stinson, and thus lost their privilege, it would seem that the judgment which they obtained against Stinson on that note should be conclusive against their claim now asserted to be a privilege. That judgment, we have seen, did not allow the privilege, although claimed in that suit. They rested satisfied with the judgment and had it recorded.

We think the consequence of their acquiescence in that judgment is the loss of their privilege, so far as third parties are concerned. We are cited to the case of *Gustine v. Union Bank*, 10 Rob. 418, in which the court held that "if under the law the debt creates a privilege or tacit mortgage, they exist independent of the judgment rendered." The question is only an *obiter dictum* in that case, and although generally true when there was no issue in regard to the privilege, it is not true in a case in which the existence of the privilege is at issue, and the judgment does not recognize the privilege.

But even if that judgment did not settle the claim of Nicholson & Co. adversely to them, they have lost their privilege by failure to reinscribe it within ten years. The privilege was recorded in 1860; the judgment was recorded in 1861, and there had been no reinscription thereof in 1872, when the bank foreclosed its mortgage. C. C. 3369.

It is therefore ordered that the judgment appealed from be affirmed with costs of appeal.

No. 5745.

TEUTONIA INSURANCE COMPANY v. THOMAS O'CONNOR et als.

While the Babcock extinguishers are used, without by such use interfering with or being in the way of the operations of the fire department, the plaintiffs or others may lawfully use them without incurring responsibility.

The resolution of the board of directors of the Firemen's Charitable Association, passed on the twenty-sixth of January, 1875, is more stringent and sweeping than it has the right to pass. Its purport is to abolish the use of the Babcock extinguisher within the limits of the city of New Orleans, under any and all circumstances whatever. The chief engineer is clothed with power and instructed to prevent the Babcock engines from running to fires, and the resolution provides, that the engineer shall "send them and the men working them to prison." This is an unwarrantable stretch of power.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Hornor & Benedict*, for plaintiffs and appellees. *Lacey & Butler, Charles H. Luzenburg, B. F. Jonas*, city attorney, for defendants and appellants.

TALIAFERRO, J. The petition sets forth that the Teutonia Insurance Company has, on its own account, with the view of protecting property insured by it against destruction by fire, brought into use "Babcock's Fire Extinguisher," an engine of a small order, which is very useful in the quick and easy suppression of fires in many instances, particularly in their incipency, owing to their aptitude for use at a moment's notice, the rapidity with which they can be transported to the place where a fire occurs, and the facility with which they may be worked, one of the smaller class of them being easily carried and operated by one man; that for several years past the company has, by its agents,

caused these machines to be used to great advantage in the extinguishment of fires—in some instances, by reaching buildings on fire before the large fire engines could be run to the place required, owing to a bad state of roads and other impediments sometimes occurring; that the plaintiffs have for some time caused these engines to be used at fires together with the common fire engines used by the fire companies, and with their consent and approval, and in all such cases, subordinately to and under the direction of the engineer controlling and directing the operations at fires. The plaintiffs complain that on or about the twenty-sixth of January, 1875, "The Firemen's Charitable Association," availing itself of the exclusive right vested in it by an ordinance of the city of New Orleans to control and direct the means to be used in the extinguishment of fires, and the members of which association being actuated by malice toward the petitioners, and with the intent of injuring them, did adopt the following resolution, viz:

"Resolved, That the Chief Engineer of the Fire Department, Thomas O'Connor, be instructed to prevent the Babcock engines from running to fires, and, if they persist, to send them and the men working them to prison."

The plaintiffs aver that about that time, at a fire on First street, several of the Babcock engines were pushed on in advance of the regular fire department's engines, and were being successfully used against the progress of the fire when the men working the Babcock engines were interrupted by the Chief Engineer of the Firemen's Charitable Association, at whose request and by whose direction the men so engaged in operating the Babcock engines were arrested by certain officers of the Metropolitan police force and sent to the lock-up of the Fourth Municipal Police Court, where charges were preferred against them of violating said city ordinance No. 1210 by the said Chief Engineer O'Connor, which they were bound over to answer by the judge of that court.

The plaintiffs charge that the city is without authority to confer upon the said association such exclusive right under its charter, and that the same is repugnant to the principles of common equity and subversive of the same.

The plaintiffs aver they have sustained great damage by the action of the said Chief Engineer O'Connor, the Firemen's Charitable Association and the Metropolitan police force, and in the full sum of one thousand dollars, for which said parties are liable *in solido*; that said parties threaten and intend to further carry out the aforesaid resolution and to prevent plaintiffs from using said extinguisher; that said action will cause them irreparable injury, and that a writ of injunction is necessary to protect the plaintiffs' rights in the premises.

The plaintiffs prayed that a writ of injunction issue to restrain the defendants from interfering with them in the premises, and they pray judgment *in solido* against them for one thousand dollars as damages and all costs of suit.

An injunction was granted as prayed for.

The Firemen's Charitable Association and Thomas O'Connor, Chief Engineer, answered, denying generally and specially all the allegations of the plaintiffs' petition. They assert the right of the State to confer the exclusive power and authority over the subject of fires to the municipal corporation of New Orleans; that the State has by the city charter granted that exclusive power to the corporation over the subject, and that the city, in its contract with the Firemen's Charitable Association to extinguish fires, has conferred, as it had a right to do, upon the said association the authority complained of by plaintiffs.

The defendants answer further that the Babcock Fire Extinguisher, in none of its sizes, shapes and forms, is effectual in extinguishing fire or putting out flame, except in its incipient stage, and owing to the very limited benefit arising at any time and under any circumstances from the use of such machine, the employment thereof at fires, where its presence is calculated to produce certain injurious results, is not only inexpedient, but improper, and ought not to be sustained by the court.

The defendants set forth at length the provisions of the city charter on the subject of the extinguishment of fires within its incorporated limits, and claiming the city's right to adopt any and all proper rules in relation thereto.

The defendants set up a reconventional demand against the plaintiffs of five thousand dollars, as damages caused by the illegal acts and conduct of plaintiffs in the premises, and by expense of attorneys' fees, which defendants have been forced to incur.

The defendants charge that plaintiffs and the Board of Underwriters and other insurance companies and associations of New Orleans have maliciously, improperly and unlawfully combined and confederated together to embarrass the Firemen's Charitable Association and unjustly and unlawfully to bring about its dissolution.

The defendants pray that on the original action judgment be rendered in their favor; that plaintiffs be cited to answer defendants' reconventional demand; that the injunction be dissolved; that defendants recover from the plaintiffs five thousand dollars, with interest at five per cent. per annum from judicial demand, with costs, etc.

The judgment of the lower court perpetuated the injunction restraining the Firemen's Charitable Association, and Thomas O'Connor, its chief engineer, and the Board of Metropolitan Police, from carrying

into effect the resolution of the board of directors of the said association, instructing its chief engineer to prevent the Babcock engines from running to fires and to imprison the men working the same. The defendants were restrained by the judgment from interfering with the plaintiffs' employes in the use of the Babcock extinguishers, as long as they do not interfere with or impede the action of the officers and members of the fire department. The defendants' reconventional demand was dismissed with costs. The defendants have appealed.

The point made in the defense is that, from the nature of the object or purpose of extinguishing fires, it is essential to efficient action that the means used, the methods adopted and the physical efforts made in resisting the terrible power of the destructive element of fire should be directed by one mind; that there should be unity of action; that the power of the fire engineer during the struggle should be as complete and absolute as that of Cæsar at Pharsalia or Napoleon at Ansterlitz; and that his movements and operations should not be impeded or interfered with by others using different engines and different methods than his own, he being the judge of what constitutes impediment or interference.

We find no objection to this doctrine. But we do not understand that the plaintiffs assume the right to use their engines at fires where the fire companies are in action, otherwise than under the direction of the managers and subject to their orders. The evidence is that the Babcock extinguisher has been often used in this manner by the consent and under the control of the directors at fires. The proof is abundant that these engines are capable of important services in cases often occurring, where they may hurriedly be sent to a house on fire in time to extinguish the fire before it becomes unmanageable, and which might destroy the building before the heavier and more tardy engines could reach the spot. Outstripping these in speed and successfully performing the work to be done before their arrival, can not be called interfering with or impeding them in the exercise of their functions. It is, we suppose, true from the testimony, that the gas used by the Babcock extinguisher is, within contracted limits, and in the incipient stage of fires, most potent in the destruction of flame, and may be productive of incalculable benefit in saving buildings from destruction by its prompt and efficient use before the fire gains the ascendancy and bids defiance to all effort to suppress it. Surely in all such cases, and we may easily perceive that very many such may occur, there can be no wrong in resorting to the use of these engines. While, therefore, they are used, without, by such use, interfering with or being in the way of the operations of the fire department, the plaintiffs or others may lawfully use them without incurring responsibility.

We must regard the resolution of the board of directors of the Firemen's Charitable Association, passed on the twenty-sixth of January, 1875, as more stringent and sweeping than it had the right to pass. Its purport is to abolish the use of the Babcock extinguisher within the limits of the city of New Orleans, under any and all circumstances whatever. The chief engineer is clothed with power and instructed "to prevent the Babcock engines from running to fires," and the resolution provides that, if they persist, the engineer shall "send them and the men working them to prison." This is an unwarranted stretch of power.

The decree of the lower court was properly rendered.

Judgment affirmed.

No. 5380.

STATE OF LOUISIANA v. JOSEPH HUGEL.

In reply to questions propounded by the judge to the juror, he said that the opinion he had referred to on his *voire dire*, as having been formed at the time of the occurrence, was not an opinion, but an impression which would readily and easily yield to evidence (strong evidence), and that he could go into the jury box and render a verdict according to the evidence in the case, regardless of the impression referred to by him. The objection by the defendant to this juror was not well founded; the juror was not disqualified. There was nothing defective in the manner of sentencing the accused. The record shows that, having been brought into court, "and having nothing to offer in arrest of judgment," he was sentenced. This sufficiently shows that he was asked if he had anything to say why sentence should not be pronounced against him.

It was not necessary that the defendant should be present when the motion for a new trial was made and overruled.

APPEAL from the Superior Criminal Court, parish of Orleans. *Atocha*, J. Criminal case. *A. P. Field*, Attorney General, for plaintiff and appellee. *Henry C. & John H. Castellanos*, for defendant and appellant.

MORGAN, J. The accused was convicted of the murder of his own daughter, and the verdict being guilty "without capital punishment," was sentenced to imprisonment for life.

In the court of the first instance he moved for a continuance, on the ground that he could not procure the testimony of the captain of the steamer *Louisiana*, and other witnesses, by whom he expected to prove that, on the voyage across the ocean, he had been vigilant in attempting to prevent improper intimacy between his daughter and several male passengers; that his daughter's honor was "a fixed and controlling idea in his mind;" that during a long period of the passage he was a prey to this gloomy idea, and frequently spoke about it, saying that he preferred to see her dead than leading a life of disgrace and prostitution.

If the witnesses had been present, and had testified as the appellant says they would, it would not have constituted a defense. The judge did not err in refusing the continuance.

The next objection he urges is that the juror, Schwartz, was not a good juror.

On his *voir dire* he stated that "from what he had read in the newspapers about this case, at the time of the occurrence, he had formed an opinion and has that opinion still; that it would require evidence to remove that opinion; that he does not consider weak evidence as evidence, but strong evidence he considers evidence." In reply to questions propounded to him by the judge, he says that "the opinion he refers to as having been formed at the time of the occurrence was not an opinion, but an impression, which impression would readily and easily yield to evidence (strong evidence, mind), and that he could go into the jury box and render a verdict according to the evidence in the case, regardless of the impression referred to by him." The juror was not disqualified. *State vs. Boyer*, 14 An. 462; 23 An. 148.

We do not find that the charge of the judge was erroneous. Neither do we think that there was any error or informality in the manner in which the indictment was found or returned to the court; nor was there anything defective in the manner of sentencing the accused. The record shows that having been brought into court, and "having nothing to offer in arrest of judgment," he was sentenced. This sufficiently shows that he was asked if he had anything to say why sentence should not be pronounced against him.

The objection that he was not present when the motion for a new trial was made and overruled is not tenable. It was not necessary that he should be present on those occasions.

Judgment affirmed.

Rehearing refused.

No. 5556.

CITY OF NEW ORLEANS v. BANK OF LAFAYETTE.

The bank of Lafayette was organized since the adoption of the constitution of 1868. Article 118 of that instrument declares what property may be exempted from taxation. Any law which is in conflict with that article, whether passed before or after the adoption of the constitution is stricken with nullity thereby, unless the law created a contract with the other party, whose property is exempted before the adoption of the constitution.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, assistant city attorney, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

LUDELING, C. J. The defendant has appealed from a judgment condemning it to pay a tax on its capital stock. The bank claims exemp-

tion from the payment of municipal taxes, under the act of 1857, No. 192, which, it is contended, is not repealed by the Revised Statutes of 1870.

The bank was organized since the adoption of the constitution of 1868. Article 118 of that constitution declares what property the General Assembly may exempt from taxation; and the property of banks is not included in any of the classes enumerated. Any law which is in conflict with that article, whether passed before or after the adoption of the constitution, is stricken with nullity thereby, unless the law created a contract with the party whose property is exempted before the adoption of the constitution.

It is therefore ordered that the judgment be affirmed with costs of appeal.

No. 4354.

LAURENT JULIEN v. CAPTAIN AND OWNERS OF STEAMER WADE HAMPTON.

Passengers have the right to require to be set on shore safely while disembarking, and they are not subjected to the hard lot of encountering dangers gotten up by those whose business it is to provide for their safety in leaving the boat. There should be no necessity existing for them to look out, or to jump from one stage to another in order to save life or limb.

Common carriers are bound to carry their passengers safely and securely, and to use the utmost care and skill in the performance of these duties, and, of course, they are responsible for any even the slightest neglect.

The burden of proof is on the defendants to establish that there has been no disregard whatever of their duties, and that the damage has resulted from a cause which human care and foresight could not prevent.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Edward Phillips*, for plaintiff and appellee. *R. H. Marr*, for defendant and appellant.

TALIAFERRO, J. This action is based upon a claim against the defendants for twelve thousand dollars damages, resulting from gross negligence and recklessness on the part of defendants' employes on board the said boat, while in the act of discharging a quantity of freight, whereby the plaintiff, a passenger on the boat at the time, received severe bodily injuries, one of his legs being crushed and broken in several places rendering him a cripple for life.

The defendants deny that the accident and injury complained of by the plaintiff were caused by want of care on the part of the defendant's agents or employes.

Judgment was rendered in favor of the plaintiff for \$1540 and costs.

The defendants have appealed.

The plaintiff took passage on board the steamer Wade Hampton in

April, 1872, to return from New Orleans to Pointe Coupee, the place of his residence. When the steamer came to at Cook's Landing, two stages were launched for the discharge of freight and for the egress of passengers. The water in the river was on a level with the land, and, consequently, the stages presented a very considerable declivity from the boat to the shore. The evidence seems to establish that while the plaintiff was on the stage going ashore and when within about four feet of the land, a barrel of flour, under the guidance of one of the deck hands, and at that moment, about midway the stage, got loose from his hold, or was purposely let go, and rolled down with great rapidity, striking the plaintiff with such force that he was knocked down to the end of the stage, by which one of his legs was broken and badly crushed, from the effects of which he was for a length of time confined to his bed and rendered permanently lame. The Wade Hampton was at that period a regular packet between New Orleans and Natchez, and it appears that on her arrival at Cook's Landing that trip she was considerably behind her time, and from the drift of the testimony we conclude that perhaps more than the usual bustle and hurry were used in getting on shore the freight for that landing, and that a proper regard for the safety of the passengers while getting ashore from the boat was not observed. There is, as usual, in all cases of this sort, a confliction of testimony, but the evidence is satisfactory that the serious injury received by the plaintiff was the result of a reckless disregard of his safety as a passenger, while he was disembarking from the boat and without contributory negligence on his part. A witness states that after the barrel was let loose some one bawled out: "Look out!" and another witness was sure the plaintiff had time to have jumped from one stage to the other and escape injury. But passengers have the right to require to be set on shore safely, and while disembarking they are not subjected to the hard lot of encountering dangers gotten up by those whose business it is to provide for their safety in leaving the boat. There should be no necessity existing for them to "look out," or to jump from one stage to another in order to save life or limb.

"Common carriers are bound to carry their passengers safely and securely, and to use the utmost care and skill in the performance of their duties." Angell on Carriers, p. 568. "And, of course, they are responsible for any, even the slightest, neglect." 2 Greenleaf Ev. 221. "The burden of proof is on the defendants to establish that there has been no disregard whatever of their duties, and that the damage has resulted from a cause which human care and foresight could not prevent." Angell on Com. Carriers. The captain and owners are responsible for the acts of their employees. 15 An. 321; 18 La. 490; 2 An. 654; 11 An. 396; 14 How. N. S. 468.

Julien v. Captain and Owners of the Steamer Wade Hampton.

The case is fully made out. We are, however, not inclined to enlarge the judgment as prayed for on the part of the plaintiff. We do not regard it as excessive. It is shown that when the accident occurred the captain procured surgical aid promptly and paid fifty dollars for the services.

For the reasons assigned it is ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 3947.

GEORGE E. WILKINSON AND FRANK BEHAN v. JOSEPH DALFERES AND JOSHUA M. JOHNSTON et als.

The charterer when he has complete control of the vessel, as in this case, is *pro hac vice* owner, as to parties dealing with him in such capacity, but he is not such in a contest with the actual owners for the value of the vessel and on the terms of the charter party. In such contest the burden is on the owners to prove the negligence of the charterer. The authorities relied on in this instance by plaintiffs refer to the responsibility of owners as common carriers, and most of them are based on the act of Congress declaring the fact of explosion to be full *prima facie* evidence of negligence on the part of the defendant; while this is an action by the owners against their lessee for the value of the property hired by them to the latter. The evidence on this occasion does not show that the defendant as lessee violated the obligations imposed upon him by article 2710 R. C. C.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Bentinck Egan, Randolph, Singleton & Browne*, for plaintiffs and appellees. *James H. Grover*, for J. M. Johnston, defendant and appellee. *R. H. Marr*, for Dalferes et als., defendants and appellants.

HOWELL, J. On the twentieth day of May, 1870, the defendant Dalferes, with J. M. Johnston as his surety, chartered the steamboat Right Way from the plaintiffs, to be used by him in the Lafourche trade for the term of four months, at the rate of \$800 per month, payable in advance. In the charter party it was expressly agreed that the said boat was tight, staunch and strong and well and sufficiently tackled and appareled, with all things necessary for such a vessel and the business and trade in which she was to be engaged; that the charterer was to have full control of her, and at the expiration of the charter, to return her and her appurtenances to the plaintiffs at New Orleans in like good order and condition as when first delivered to him, the usual damage, wear and tear, consequent upon navigation and acts of God, fire and dangers of navigation excepted.

About the eighteenth or twentieth of July following one of the boilers exploded and the boat sank at a landing in the Bayou Lafourche, a few miles above Thibodaux. This suit was instituted on twenty-first September same year for the value of the boat and a balance of the second month's rent or hire. Dalferes averred that nothing was due the plaintiffs, that by the explosion and the sinking of the boat the

contract was terminated, that in hiring the boat he acted to the knowledge of plaintiffs for the Coast and Lafourche Packet Company, for whose account she was run; that he was not master and not on board; that she was in charge of competent and skillful officers as required by the law; that there was no negligence or fault on the part of himself or those in charge; that the explosion was attributable either to the defective condition of the boilers and machinery at the date of the charter, and which required repairs immediately thereafter, or some other cause beyond the power and control of himself or those for whom he is answerable, and he called the Coast and Lafourche Packet Company in warranty. This company and Johnston, the surety, adopted substantially the defendants' answer, the latter averring that the charter had been transferred without his knowledge or consent. The defendants and warrantors have appealed from a judgment against them, and the plaintiffs from a judgment in favor of Johnston the surety.

The plaintiffs' counsel say "the first question to be determined is whether the words, 'acts of God, fire and dangers of navigation' which were excepted in the charter party, would cover a loss by explosion?" and they cite 14 An. 501; 5 R. 138; 23 Law Rep. 277; 16 Howard 472; 24 How. 386; 1 Sprague 477; 1 Clifford 322; 8 Wallace 160 and 162; 1 Parsons on Ship. and Adm. 257, as authority in the negative. These authorities refer to the responsibility of owners as common carriers and most of them are based on the act of Congress declaring the fact of explosion to be full *prima facie* evidence of negligence on the part of the defendant; while this is an action by the owners against their lessee for the value of the property hired by them to the latter. "The lessee is bound, first, to enjoy the thing leased as a good administrator according to the use for which it was intended by the lease; second, to pay the rent at the terms agreed on." R. C. C. 2710.

The evidence in this case does not show that the defendant violated this obligation; and we think it unnecessary to go into an analysis of the conflicting testimony in order to ascertain and definitively settle upon the cause of the explosion on scientific principles.

The charterer, when he has complete control of the vessel, as in this case, is *pro hac vice* owner as to parties dealing with him in such capacity, but he is not such in a contest with the actual owners for the value of the vessel under the terms of the charter party. In such contest the burden is on the owners to prove the negligence of the charterer.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendant and warrantors with costs.

Rehearing refused.

 Alfred Hennen, Mrs. A. M. Hennen, v. Forget, Guillotet et al.

No. 4841.

ALFRED HENNEN, MRS. A. M. HENNEN, Executrix and Universal Legatee, subrogated, v. FORGET, GUILLOTET et al. PIKE, BROTHER & Co., garnishees.

On the day fixed for hearing on the rule taken by plaintiffs on the garnishees in this suit to show cause why their answers should not be taken for confessed, an exception to the motion made by the garnishees for leave to amend and explain said answers, was objected to by plaintiffs on the ground that it was too late, and overruled by the judge *a quo*. There was no error in this ruling.

The garnishees evinced no disposition to refuse or neglect to answer, or prevaricate. Their original answers were not drawn as definitely as they might have been, but when read in reference to the manifest intent of the interrogatories which were addressed to them as bankers, gave a negative response to all the questions.

When a depositor's account with his banker is closed, the inference is clear and manifest that he has no funds in the hands of said banker.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. B. R. Forman*, for plaintiffs and appellants. *Hays & New*, for garnishees and appellees.

HOWELL, J. The plaintiff having judgment against Victor Gerodias issued garnishment process against Pike, Brother & Co., and to the usual interrogatories added a fourth and fifth, to wit: Fourth—Does not Victor Gerodias keep an account in your bank? Fifth—Has not Victor Gerodias a bank box or other special deposit in your bank vault or in your possession or under your control, and what are the marks, numbers and value of the same and contents, and is not the same sufficient to satisfy this writ of execution?

The day (twenty-fifth March, 1875) after the service of said interrogatories the following answers were filed.

"Now come into court Pike, Brother & Co., bankers, through Paul Blanc, one of the firm, who, responding to the interrogatories propounded in this case, says: First, second and third interrogatories are answered under oath as follows: Victor Gerodias has kept an account with us but has made no deposit since the second day of January last, 1873. His account with us is closed. Interrogatory 5—We have on special deposit a bank box in our vault, No. 1932, the property of Victor Gerodias; what may be the contents or value thereof, we know not.

Signed,

PIKE, BROTHER & CO.,

By PAUL BLANC."

On seventeenth April the plaintiff moved to take the interrogatories for confessed and for judgment against the garnishees for the full amount of the writ against Gerodias, which the court refused, but suggested a rule to show cause, and the plaintiff, reserving a bill of exceptions to this ruling, took the rule on the garnishees to show cause why the interrogatories one, two, three and four should not be taken as confessed, on the ground that they have failed to answer the same.

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On the day fixed for hearing, the garnishees asked leave to amend and explain their answers, which was allowed, and the plaintiff excepted, because the amendments came too late and because the original answers were not responsive to the first second and third interrogatories, and the failure to answer the second and the fourth amounted to a confession, and the garnishees can not explain or contradict such confession nor amend.

The amended answers are "that they intended, in saying the account of Gerodias was closed, that said Gerodias had no funds whatever in their hands or under their control, belonging to said Gerodias or in which he had any interest at the date of the service of said interrogatories. That they intended by that answer to negatively reply to interrogatories one, two, three and four, and to say that they had no funds of said Gerodias in their hands or under their control at said date."

There was judgment for the garnishees and plaintiff appealed.

We are of opinion that there was no error in these rulings. The garnishees evinced no disposition to refuse or neglect to answer or to prevaricate. Their original answers were not drawn as definitely as they might have been, but when read in reference to the manifest intent of the interrogatories which were addressed to bankers, they show a negative response to all the questions. When a depositor's account with his banker is *closed*, the inference is clear and irresistible that he has no funds in the hands of the banker.

Judgment affirmed.

No. 5368.

ANN DALTON, for the use of, etc. v. SUCCESSION OF PATRICK HALPIN.

A suit against an administrator of an estate for alimony by natural children can not be maintained.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Robert G. Dugé*, for plaintiff and appellant. *T. Gilmore & Sons*, for defendant and appellee.

LUDELING, C. J. The plaintiff sues for alimony for her children from the succession of their natural father.

The administrator excepted on the ground, among others, that proper parties were not made. This exception was maintained; and the plaintiff appealed.

In the case of *Drouet v. Succession of Drouet*, it was held that a suit against an administrator of an estate for alimony by the natural children will not be maintained. C. C. 241, 919.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

HEIRS OF JOHN SLIDELL v. J. HUPPENBAUER.*

The act of Congress, July 17, 1862, to suppress insurrection, etc., and the joint resolution of the same date explanatory of it, are to be construed together. Under the two thus construed, all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

The fact that such person owned the estate in fee simple, and that the libel was against all the right, title, interest and estate of such person, and that the sale and Marshal's deed professed to convey as much, does not change the result.

On revising the decree of confiscation by the tribunal of last resort, the rights of the parties and the questions at issue at the time of the libel and decree were the subjects of inquiry. The rights which the plaintiffs now assert were not those at issue. They could not have intervened in the confiscation proceedings against John Slidell, to assert rights which only accrued to them long afterwards, namely, on the death of their father, John Slidell.

The litigation on the writ of error and the revision by the Supreme Court of the United States only involved the validity of the confiscation. In this instance, the question is, are the plaintiffs entitled, under act of July 17, 1862, to the property in controversy, since the death of their father, notwithstanding there was a valid confiscation of it under said statute? The question must be decided in the affirmative.

APPPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Clarke, Bayne & Benschaw*, for plaintiffs and appellees. *L. Madison Day*, for defendant and appellant.

WYLY, J. The plaintiffs, the heirs of John Slidell, sue the defendant for two lots of ground and the buildings on Common street, which he acquired under a writ of *venditioni exponas* issued on the judgment condemning them, under act of Congress of July 17, 1862, as the property of John Slidell; they also claim the rents of said property since the death of Mr. Slidell, July 30, 1871. There was judgment for plaintiffs and defendant has appealed.

In *Bigelow v. Forrest*, 9 Wallace 339, the Supreme Court of the United States decided that the act of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and the joint resolution of the same date explanatory of it, are to be construed together. Under the two thus construed all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offense it had been seized. The fact that such person owned the estate in fee simple, and that the libel was against all the right, title, interest, and estate of such person, and that the sale and marshal's deed professed to convey as much, does not change the result. In *Micon v. Day*, *Heirs of John Slidell v. Brugere* and the same *v. Heath*, this court followed the interpretation of the act of July 17, 1862, given by the Supreme Court of the United States in *Bigelow v. Forrest* and held that the confiscation did not reach beyond the life of

the offender. These decisions were, on writ of error, affirmed by that court. We regard the question as settled and must decide this case as we did those of the same plaintiffs against Brugere and Heath. The defendant, however, contends that as the plaintiffs were parties to the writ of error to the Circuit Court for the District of Louisiana and the cases known as the confiscation cases, 20 Wallace 104, they are concluded by said decision from claiming that the decree of condemnation only extended to the life estate of John Slidell, because by said judgment the decree of condemnation of the District Court was ordered to be affirmed, which declared the lots in question "the property of John Slidell" etc., "be and the same is hereby condemned as forfeited to the United States." This same judgment condemned also the lots involved in the suit of these same plaintiffs against Brugere and also against Heath—all of Slidell's property was confiscated in this same decree rendered in the case styled *United States v. 844 lots and 16 squares of ground*, the property of John Slidell on the docket of the district court—yet in the cases mentioned this court held that the condemnation and sale only extended to the life estate of Slidell. The confiscation in the case of Benjamin, under a similar decree, this court held in the case of *Micou v. Benjamin*, to extend only to the life estate of the offender. In *Bigelow v. Forrest*, all "the real property mentioned and described in the libel" was condemned and sold, yet the Supreme Court of the United States decided that "under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction."

How the title of the defendant, a purchaser under the same decree and order of sale as that under which Brugere and Heath purchased, could acquire a better title than they did, or than that received by him at the adjudication, because of a subsequent revision and affirmation of the said decree by the Supreme Court of the United States, it is difficult to imagine. And how the litigation of the writ of error to which plaintiffs were made parties, after the death of their father, John Slidell, and the decision maintaining the confiscation, can estop them from asserting rights which arose subsequent to the confiscation and which under act of July 17, 1862, were reserved to them notwithstanding the validity of the confiscation, it is likewise difficult to understand. In revising the decree of condemnation the rights of the parties and the questions at issue at the time of the libel and decree were the subjects of inquiry. The rights which the plaintiffs now assert were not then at issue. They could not have intervened in the confiscation proceedings against John Slidell to assert rights which only accrued to them long afterward, namely, on the death of their

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father John Slidell. The litigation on the writ of error and the revision by the Supreme Court of the United States only involved the validity of the confiscation. Here the question is, are the plaintiffs entitled under act of July 17, 1862, to the property since the death of their father, notwithstanding there was a valid confiscation of it under said statute. Under the decisions of this court and the Supreme Court of the United States in similar cases the question must be decided in the affirmative.

Judgment affirmed.

* Carried by writ of error to the Supreme Court of the United States.

No. 5312.

MRS. JANE H. H. TODD v. JOHN BOURKE. VAN SOLINGEN & CARPENTER, called in warranty.

From the evidence in this case, the relations of the two defendants in warranty toward the plaintiff must be regarded as being something more than those of brokers. Their functions and obligations did not cease upon merely bringing together the parties that were to contract and leaving them to arrange their business as they saw best. They must be regarded in the light of mandatories and as having assumed themselves this character, in consequence of which they were bound to use the same diligence and precaution to prevent fraud being practiced upon the plaintiff, that a prudent man would use in regard to his own affairs. Their not having done so, makes them responsible for the consequences of the fraud which they could have detected and defeated by ordinary diligence.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. W. B. Lancaster*, for plaintiff and appellee. *Richard Shackelford*, for defendant and appellee. *Braughn, Buck & Dinkelspiel*, and *G. L. Hall*, for warrantors and appellants.

TALIAFERRO, J. The plaintiff had twelve hundred dollars, which she was willing to put out at interest on mortgage security, and entered into an arrangement of the sort, as she supposed, with the defendant, Bourke, through the agency and advice of Van Solingen & Carpenter, brokers engaged in real estate business, the negotiation of mortgages, and matters of that kind. These brokers found that one William McC. Jones, a notary public, had a mortgage note, purporting to be signed by Bourke, the defendant, by making a cross mark for twelve hundred dollars, which they were informed Bourke desired to have discounted, McC. Jones representing to them that the property proposed to be mortgaged was worth five thousand dollars and the title good, and the acts prepared to be passed before him. The plaintiff was informed of these facts, and advised by the brokers to make an investment of her money in the manner proposed, which she accordingly did, after going to see the property proposed to be mortgaged and on

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further conference with the brokers and the title to the property being examined by an attorney. It turned out that the pretended note and mortgage were forgeries, gotten up by McC. Jones, the notary, who, some time after this operation, absconded with the money which he had pretendingly received for Bourke.

The plaintiff brought this suit against Bourke on the note she received, and, subsequently, in an amended petition, called Van Solingen & Carpenter in warranty. Judgment was rendered in favor of Bourke, but in favor of the plaintiff against Van Solingen & Carpenter, *in solido*, for twelve hundred dollars, with interest, etc., and they prosecute this appeal.

A solution of this case depends mainly upon the conclusions to be drawn from the evidence, and that is conflicting. The plaintiff herself, her sister and father testify on her behalf, and the brokers in their own behalf.

The brokers say in their evidence that they knew nothing of their own knowledge of Bourke, whose note was to be discounted, nor of the property to be mortgaged, but derived their knowledge from McC. Jones, with whom they had frequent business transactions, and in whose integrity they had always implicitly confided. They both flatly deny that they ever told the plaintiff they were well acquainted with Bourke. The plaintiff is equally as positive in asserting that Carpenter was asked by her if he knew Bourke, and that he replied he did; that Bourke was a man of the highest reputation, a man he would trust with any amount of money. The plaintiff's sister is equally positive in her statement that Van Solingen told her that he knew this man Bourke very well, but he said: "When you go to look at the house, you must not go in, because Mr. Bourke was a very proud man, and he did not want any person in the neighborhood to know he was borrowing money." The plaintiff's father is equally positive in his statement that he asked Carpenter if he knew Bourke, and that he answered he knew him perfectly, and that he knew the property.

If we attach credit to the statements of the plaintiff and those of her sister, we must infer that the brokers used persuasive means to induce the plaintiff to make the investment, and even a doubt might arise whether they did not take the initiative in the matter of making the investment. When placed upon the stand as a witness and being instructed by the attorney to tell all that transpired between herself and the brokers in regard to investing her money, the plaintiff said: "I was advised by them, who knew I had this money, to invest it—that it would be much better to put it out on a mortgage and to get interest. They advised me to do this in the capacity of friends, as they had known my family for years, as well as myself. I told Mr. Carpenter

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that I did not wish to invest the money in anything, and I would rather keep it and get no interest. He then stated that it was not perfectly safe to keep money in that manner. I told him we had had so much trouble that I would rather keep my money; that I had worked hard for it. He said no, that there would be no trouble, and that he would see that all was perfectly safe; that he would see to it as if it was for his own daughter, and that it would be perfectly right. He told me to go and look at the property, as it was very seldom that one could find an opportunity to loan out so small an amount on good mortgages. He cautioned me before going to look at the property not to enter the house, because the gentleman who wished to borrow did not want it known that he was borrowing money, and that he was a very proud man; that we could look at the house from the outside and see that it was fully worth that amount of money." * * *

"So we went the next day to Van Solingen & Carpenter to pay the money for the note. I then noticed that the man, John Bourke, signed his name with a mark. I thought it very strange that a proud man, as he was represented to be, was not able to sign his name, and I said to Mr. Carpenter: 'This man signs his name with a mark.' He said yes. I said it is very strange, being such a proud man, that he should sign his name with a mark." * * *

"I would like to see the man who made that mark; there is nothing to prove that it is his mark. I said: 'Did you see him sign the mark?' and Mr. Carpenter said yes. Then I said: Very well; if you saw him make the mark it is all right. I rely on your word. I believe you are a friend of mine, and if anything was wrong you would tell me. The money was then paid. Mr. Van Solingen also advised me to do it."

The plaintiff's sister testifies in this manner: "I had a property, and at the time there was a note coming due on it. Messrs. Van Solingen & Carpenter were the agents to procure more money on it. I let the property I had go; it was sold by the sheriff, and this Messrs. Van Solingen & Carpenter knew, and that we had the money. Mr. Van Solingen came up to the house, and he said to me: I have a splendid piece of property for you to invest your money in. It was much safer to invest it than to keep it idle, and also to keep it in the house." * * *

"When the note became due, I told her (the sister) it was time to renew the insurance. She went down to Van Solingen & Carpenter to see about it. The moment I went in, Mr. Van Solingen said: 'I never liked that Mr. McC. Jones, and,' he says, 'he was put in the Louisiana Retreat for drinking.'" * * *

"When I went to Messrs. Van Solingen & Carpenter they acted very strange; they did not wish to interest themselves in the case at all."

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Then there is the father's testimony, corroborating in several important particulars the statements of the two daughters. He says that he dissuaded the plaintiff from making the investment; that he thought it a bad investment for a young lady to have anything to do with mortgages, and told her she had better not; but she held out that Mr. Carpenter had said this and that, and what great good we could do this man and Carpenter. The statement of this witness is that he went to the office of Van Solingen & Carpenter for the purpose of asking a few business questions relative to the mortgage. The record shows that he made special inquiries of Carpenter as to the object and purport of the mortgage; whether he knew the party with whom they were to deal, and if he knew the property. He inquired of him if there was an abstract of the title; that after the thing was talked over, Carpenter said the deeds and everything were correct, and that he would attend to the insurance being made out in his daughter's name. He then says he asked Carpenter if he was present and saw these deeds signed in the notary's office, and he said he was. My daughter, he continues, had previously asked him as to the signature of Mr. Bourke being made with a cross or mark. Mr. Van Solingen said that he was so well acquainted with the man that there was not the slightest or most remote danger. This witness, after much detail, says: "The substance of the whole conversation was just simply this, that they vouched for the correctness and honesty, and uprightness of the mortgage; that they had known this man for years; that he was above reproach, and there would be no difficulty in getting the money when the mortgage fell due."

Here then are three witnesses, two of whom have no direct interest in the case against two who have. In regard to the plaintiff we must bear in mind that she is a young woman obviously ignorant and unskilled in negotiations of the kind, evidently distrustful and hesitating, and at first, unwilling even, to make an investment, fearful of risking a loss of her money. That state of feeling and a disposition of that sort, it was natural to expect in a female of her years, wholly inexperienced in making investments of money. All the particulars of the negotiations that occurred in making this instrument are detailed by the two sisters at considerable length, and the circumstances under which they were made are given with minuteness. This was to be expected. The lending out of \$1200, all the plaintiff's money, was to her a very important matter, and it is not to be wondered at that the circumstances attending the act created durable impressions upon her mind. More reliance, we should be inclined to think, might be placed on the memories of those two witnesses in regard to all that occurred during the transaction, than upon those of the brokers, who,

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in the midst of other business, perhaps of much greater magnitude and importance, were not so exclusively absorbed in thinking of this single subject.

There is no good reason why the statements of these three witnesses, involving no contradictions, betraying no want of consistency, and being plain, simple and natural, should be disregarded, because they are so curtly contradicted by the brokers testifying in their own behalf. We must, from the evidence, regard the relations of these two defendants toward the plaintiff as being something more than those of brokers. Their functions and obligations did not cease upon merely bringing together the parties that were to contract and leaving them to arrange their business as they saw best. We must regard them in the light of mandataries, and as having assumed the character themselves, that they were bound to use the same diligence and precaution to prevent fraud being practiced upon the plaintiff that a prudent person would use in regard to his own affairs.

The evidence justifies the conclusion that they evinced an unusual desire that the investment should be made; that they were persistent in their recommendations to the plaintiff to invest her money, assuring her of the safety and advantage to her of the operation. They moreover assumed the responsibility of giving their personal attention to the transaction, and seeing that everything should be fully and correctly done to render it safe and beyond all hazard. Upon these assurances alone, and looking to them for their fulfillment, we are satisfied, the plaintiff was induced to lend her money. True, it is shown that they advised that the title should be examined, and were instrumental in employing an attorney to do it; but no examination or scrutiny was made of the note, the mortgage, the transfer of the policy of insurance, nor of the mortgage certificate, if there were one. Four forgeries were necessary in the transaction to carry it out—Bourke's signature to the note, his signature to the mortgage, his signature to the transfer of the policy of insurance, and the recorder's signature to the certificate of mortgage. The forged act of mortgage contains a clause reciting that "according to the annexed certificate of the recorder of mortgages in and for the city and parish, dated this day, it will appear that said property is free of all incumbrance in the name of the mortgagee." Now, the brokers knew that the money to be advanced by the plaintiff was to pay off a mortgage then existing, made by Bourke. It is clear that a circumspect examination of these papers would have developed the fraud intended, and have saved the plaintiff from being made the victim of it. Yet, these defendants chose to rely implicitly upon the integrity of the notary, of whom, after the fraud became known, one of them said he "never thought much of this McC. Jones." The purpose

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of McC. Jones in having Bourke's house and premises examined without his knowledge or that of his tenants was sufficiently explained after the perpetration of the fraud. His solicitude that the equanimity of Bourke's tenants should not be disturbed by persons interested in knowing the value of the property, instead of exciting suspicion in the minds of the brokers, was appreciated by one of them at least, for Van Solingen, when interrogated as to whether or not he advised the plaintiff and her sister, when they went to look at the property, not to go inside of the house because Mr. Bourke was a very proud man and did not wish it known in the neighborhood that he was borrowing money, answered "that McC. Jones stated he did not wish the tenants disturbed any more than was necessary." To the question: "Did you tell them that?" he answered: "It is very probable that I told them what Mr. Jones stated to me."

We have attentively reviewed the evidence found in this suit, and think it sustains the judgment appealed from.

The case of *Buddecke v. A. & A. Harris*, 20 An. 563, presented on the part of the defendants as sustaining them, is not a parallel case with this one.

It is therefore ordered that the judgment of the district court be affirmed with costs.

HOWELL, J., *dissenting*. On third November, 1873, plaintiff as holder of a note of \$1200, dated twenty-third of August and due at one year from date, and mortgagee in the act of mortgage executed to secure its payment, sued the defendant as maker of said note, and asked that the mortgage be enforced. The defendant answered denying having executed or signed the note or act of mortgage, and denying any indebtedness to plaintiff, whereupon she filed an amended petition alleging that she received the note from Van Solingen & Carpenter, a firm of brokers, composed of H. M. Van Solingen and John C. Carpenter, who represented the note to be good and genuine, and received from her the full value thereof; that relying entirely upon their skill and correctness as brokers and paying them for their services, she made no personal effort to ascertain the genuineness of the note or mortgage; that they undertook to give her a perfectly good investment for her money, but they were guilty of gross neglect or incompetency; and that by virtue of their employment, and expressly or verbally, guaranteed the note as such, and are bound to her as warrantors, and she called them in warranty.

They filed a general denial, and after hearing evidence the court *a qua* rendered judgment dismissing the suit as to defendant Bourke, and

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against Van Solingen & Carpenter as warrantors for the amount of the note, from which they appealed.

The material facts, according to my estimate of the testimony, are, that one William McC. Jones, a notary public, informed the appellants that Bourke wished to effect a loan of \$1200 on a mortgage upon a certain piece of property worth \$5000; they stated to him that they knew a party who wished to invest such an amount, but it must be a good and secure investment; the notary gave a description of the property, and the appellants saw and advised plaintiff to examine it, which she did, and expressed herself satisfied as to its value; the notary then left the papers prepared by him with appellants, who advised plaintiff to employ a lawyer to examine the titles, which was done, and the lawyer reported favorably, and the matter was closed at the office of the appellants by the delivery of the note to the plaintiff and the money to the notary. A few days before the maturity of the note plaintiff called on one of the appellants, who advised her, as the note was not in bank, to notify Bourke that it was about to mature. She called on him, never having seen him before, and he denied owing such a note. She informed appellants, and one of them went with her to see the notary; but learned from a Mr. T. S. Elder, with whom it seems the notary kept his office, that the notary had left, and he, Elder, feared it was a trick or fraud similar to those he had perpetrated against other parties, whom he named. Bourke testified that he did not execute the note or mortgage in suit. There is no proof that the appellants bound themselves personally for the debt. The statements of the plaintiff, her sister and father, as to what the brokers said about the defendant, Bourke, and the nature of his credit and the note, do not, in my opinion, make the brokers the guarantors of the notary, or the genuineness of the note and mortgage, as they are not shown to have had any knowledge or suspicion of the fraud; and the question is, are they liable as warrantors or guarantors, as charged?

A broker or intermediary is he who is employed to negotiate a matter between two parties, and for that reason is considered the mandatory of both. His obligations are similar to those of an ordinary mandatory, with this difference, that his engagement is double, and requires that he should observe the same fidelity to all parties, and not favor one more than the other. He is not responsible for the events which arise in the affairs in which he is employed; he is only, as other agents, answerable for fraud or faults. Except in case of fraud, he is not answerable for the insolvency of those to whom he procures sales or loans, although he receives a reward for his agency and speaks in favor of him who buys or borrows. Commercial and money brokers, besides the obligations which they incur in common with other agents, have

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their duties prescribed by the laws regulating commerce. R. C. C., articles 3016, 3020.

In this case, I think the evidence does not establish fraud or fault on the part of the appellants. They with others had confidence in the notary, who up to about the maturity of the note in suit, bore a good reputation in the community, and the transaction was conducted as was usual in similar transactions. They acted with the fidelity of ordinary mandataries, and are not responsible to plaintiff, as charged.

For these reasons I dissent.

Mr. Justice Wyly concurs in this dissenting opinion.

Rehearing refused.

No. 3547.

JOHN S. AND LOUISE SKINNER v. WILLIAM C. SIBLEY.

Whether, in this instance, the tutrix was indebted or not to her minor children, is a matter of indifference, inasmuch as their mortgage was not recorded, as required, by the first of January, 1870, but only on the ninth of May of said year.

APPEAL from the Seventh District Court, parish of Orleans. *Cotlens, J. Breaux, Fenner & Hall*, for plaintiffs and appellees. *Campbell, Spofford & Campbell*, for defendant Sibley. *Gustavus Schmidt*, for Aglaé Gallier and Esterbrook, called in warranty, and appellants.

MORGAN, J. Petitioners allege that their mother, their tutrix, owes them \$669 22, according to her account filed in the Second District Court of New Orleans on the twenty-third of April, 1859; that on the twenty-sixth of September, their mother acquired a house and lot at the corner of Rampart and Customhouse streets, in this city, which is now in possession of the defendant. They claim a tacit mortgage upon this property to the extent of their mother's indebtedness to them, and, after due notice, seek to have the same recognized, and ask that the defendant be ordered to pay them the amount due, or, in default thereof, that the property be sold to pay the same.

The defendant answered, calling Mrs. John Gauche, the representative of John Gauche's estate, from whom he purchased, in warranty. Mrs. Gauche called in Gallier and Esterbrook, from whom John Gauche purchased.

Mrs. Gallier, representing her husband deceased, denied that there existed at the time of the sale any mortgage on the property in favor of the plaintiffs, and that the mother's acknowledgment of the same is false and fraudulent.

Esterbrook makes the same answer. There was a judgment in favor of the plaintiffs, and against the warrantors *seriatim*. Messrs. Gallier and Esterbrook appeal.

John S. and Louisa Skinner v. Sibley.

Whether the tutrix was or was not indebted to her minor children is a matter of indifference, inasmuch as their mortgage was not recorded by the first of January, 1870. It was only recorded on the ninth of May, 1870.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed as regards the appellants, and that there be judgment in their favor, with costs in both courts.

Rehearing refused.

No. 5595.

STATE OF LOUISIANA v. NED TAYLOR.

The record shows the accused was present during the trial, that he was arraigned and pleaded not guilty. Nothing more was necessary.

The transcript, which is very badly made up, does not show that the accused was asked if he had anything to say why judgment should not be pronounced against him. It is not considered that this ceremony is necessary, though usual and perhaps prudent, in cases not capital.

The regular *venue* drawn for the term was set aside on the objections urged by defendant, that it had been drawn under the act of 1873 instead of that of 1868, and the special *venue* shows that it was drawn under an order of the judge commanding the same. The defendant's objection to the drawing of the jury can not be maintained.

The refusal of the judge *a quo* to permit the accused to contradict the official acts of the clerk by his parol evidence was proper.

A PPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J.* Criminal case. *M. Marks*, District Attorney, for the State, appellee. *Nichols & Pugh*, for defendant and appellant.

LUDELING, C. J. The defendant and appellant in the above suit has been tried and convicted of horse stealing, and from a judgment sentencing him to two years' imprisonment in the penitentiary, he has taken this appeal.

Defendant assigns for error:

First—That the record does not show that the defendant was present in court during the various stages of the trial.

Second—That the record does not show that the accused was asked, before sentence, if he had anything to say why sentence should not be pronounced against him.

First—We think the record does show that the accused was present during the trial. He was arraigned and pleaded not guilty. During the course of the trial several bills of exceptions were taken to the rulings of the judge, and after conviction he filed a motion for a new trial.

Second—The transcript, which is very badly made up, does not show that the accused was asked if he had anything to say why judgment

should not be pronounced against him. But we do not consider this ceremony necessary, though usual and, perhaps, prudent, in cases not capital. 4 Black. 375; 2 Hale's P. C. 401, 407, 408; 1 Chit. Cr. Law 720; West v. State, 2 Ala. 212, Archibald C. of Practice, p. 676.

Third—The regular *venire* drawn for the term was set aside on objections urged by defendant, that it had been drawn under the act of 1873 instead of that of 1868, and the special *venire* shows that it was drawn under an order of the judge commanding the same.

The refusal of the judge to permit the accused to contradict the official acts of the clerk by his parol evidence was proper.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 2804.

JAMES L. LOBDELL v. BUSHNELL AND OTHERS.

Compensation allowed to experts, auditors and judicial arbitrators is, by article 552 Code of Practice, to be paid, as well as the taxed costs, by the party cast; and this implies a delay of payment until the termination of the suit.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Elmore & King*, for plaintiff and appellant. *G. Schmidt*, for defendant and appellee. *J. H. Grover*, for Henry Bezou, auditor of accounts, appointed by the court, and Henry Bezou, *in propria persona*.

LUDELING, C. J. During the progress of this suit the district judge appointed Henry Bezou, auditor, to examine the accounts between the parties. He charged seven hundred and fifty dollars, for which he asked the court to allow him a judgment against the plaintiff and defendants, *in solido*, in a rule taken in said case, and the court rendered a judgment in his favor for said sum against all the parties, *in solido*.

From this judgment the plaintiff has appealed. Judgment was rendered in favor of the plaintiff against the defendants, and although one of the defendants succeeded in getting the judgment reversed as to *him*, still there is a judgment in favor of plaintiff against the other defendants.

In the case of the city of New Orleans, claiming expropriation of property, etc., 19 An. 382, this court said: "Compensation allowed to experts, auditors and judicial arbitrators is, by article 552 Code of Practice, to be paid, as well as the taxed costs, by the party cast; and this implies a delay of payment until the termination of the suit."

It is therefore ordered that the judgment against the plaintiff be annulled, and that the appellee pay costs of appeal.

No. 5610.

THE STATE OF LOUISIANA v. JERRY GUSTAVE et als.

It sometimes happens that the prosecution, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly. In such case, according to legal authority, if no evidence whatever be given to affect a person thus unjustly made a defendant, the judge in his discretion may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony.

From this authority, as laid down, the inference would seem to be that, when the judge considers the evidence of sufficient weight to question the innocence of the parties sought to be made witnesses for the principal defendant, he should not order their acquittal. The ruling of the judge *à quo* in this case is in conformity with this doctrine, and must therefore be maintained.

APPPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing*, J. Criminal trial. *A. C. Read*, district attorney, *A. P. Field*, attorney general, for plaintiff and appellee. *A. S. Herron*, for defendant and appellant.

TALIAFERRO, J. Jerry Gustave, as principal, and James Small, Henry Young and Henry Bowles, as accessories before the fact, were indicted for the murder of one George Connor. The three parties indicted as accessories were acquitted. Jerry Gustave was found guilty of manslaughter and sentenced to hard labor in the penitentiary for the term of ten years. He appeals from the judgment.

It appears from a bill of exceptions in the record that after the State had closed its testimony, the accused, by his counsel, moved the court, there being no evidence to convict Joseph Small, Henry Young and Henry Bowles, accused as accessories, to submit the case to the jury as to those parties, so that they might be acquitted and made competent witnesses for defendant, Jerry Gustave, to use on his trial. This application the court refused to grant.

Again, after the testimony was closed, the accused made a similar application to the court, which was again refused. The complaint is that the defendant was deprived of the benefit of the testimony of these persons and was compelled to submit his case to the jury without their testimony.

After the finding of the jury, acquitting the three parties indicted as accessories and convicting Jerry Gustave, he moved the court for a new trial. The judge of the lower court, in giving his reasons for refusing the application to submit the cases of the parties indicted as accessories to the jury before that of the principal, says he considered the evidence against the said three parties as of sufficient weight and importance to warrant him in overruling the application. The law as found in Archbold's Criminal Pleading, vol. 1, p. 148, is that: "It sometimes happens that the prosecution, in order to exclude the evidence of a material witness for the defendant, prefers his indictment

against both jointly. If, therefore, in such a case, no evidence whatever be given to affect a person thus unjustly made a defendant, the judge in his discretion may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony."

From this authority the inference would seem to be that when the judge considers the evidence of sufficient weight to question the innocence of the parties sought to be made witnesses for the principal defendant, he should not order their acquittal.

It is manifest from the reasons assigned by the judge in this case that his mind, from hearing the evidence, was not satisfied with the innocence of these parties.

We conclude the ruling of the court was correct.

Judgment affirmed.

No. 3955.

HYPPOLYTE GALLEY v. LEOPOLD GUICHARD, Tax Collector.

The State has the power to establish a police for the various municipal corporations which she has created and which she employs in the administration of government. As she could establish a police department in every parish of the State, no reason can be seen why she could not pass an act establishing a Metropolitan Police district composed of the municipal corporations (cities and parishes) mentioned in the act on the subject, and require the expenses thereof to be apportioned among them severally in proportion to the number of policemen employed in each. This has been done in the acts of 1868 and 1869, establishing and regulating the Metropolitan Police district.

It is not pretended that plaintiff is required to pay a greater tax than any other citizen in the parish of St. Bernard, nor is there any proof showing that the apportionments assessed by the police commissioners for the years 1869 and 1870 are not just and in proportion to the number of officers and policemen assigned to police duty in said parish during said years. So that plaintiff, not being required to pay an unequal tax for the expenses of policemen actually employed for the public welfare in the parish of St. Bernard, has no cause to complain; none of his constitutional rights have been violated.

APPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. Sambola & Ducros*, for plaintiff and appellant. *J. E. Beckwith*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment dissolving the injunction sued by him to restrain the collection of the Metropolitan Police tax assessed to him by the police jury of the parish of St. Bernard for the years 1869 and 1870.

The most important objection to this tax set up by him, is that it is not equal and uniform throughout the Metropolitan Police district. That it is equal and uniform throughout the parish of St. Bernard is not doubted.

That the State has the power to establish a police for the various municipal corporations which she has created, and which she employs

in the administration of government, can not be doubted. Indeed, she can pass any law, whether wise or unwise, provided it is not repugnant to the constitution. As she could establish a police department in each parish, we see no reason why she could not pass an act establishing a Metropolitan Police district composed of the municipal corporations (cities and parishes) mentioned in the act, and require the expenses thereof to be apportioned among them severally in proportion to the number of policemen employed in each. And this we understand has been done in the acts of 1868 and 1869 establishing and regulating the Metropolitan Police district. One clause of section 25 of act No. 92 of the acts of 1869 provides: "That such estimate (by the police commissioners) shall be accompanied by a written apportionment by said board of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan Police district in ratio of the number of police officers and men assigned by said Metropolitan Police Board for police duty in said cities or parishes within the Metropolitan Police district."

Another clause thereof provides that "The said estimate and apportionment shall be submitted to the mayor of the cities and police juries of the parishes within the said Metropolitan Police district, to consider the same, and if the said mayor or police juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify or cause to be notified the said board of commissioners, it shall be the duty of the latter to carefully revise the same and consider the said objections." * * *

Now where is there any violation of that provision of the constitution requiring uniformity and equality in taxation? It is not pretended that plaintiff is required to pay a greater tax than any other citizen of the parish of St. Bernard; nor is there any proof showing that the apportionments assessed by the police commissioners for the years 1869 and 1870 are not just, and in proportion to the number of officers and policemen assigned to police duty in said parish during said years. There is no proof that the parish of St. Bernard ever complained of the apportionments and made a written application to the police commissioners for the revision of said apportionments. There being no proof on the subject, the presumption is the officers have done their duty; and the apportionments are just and in proportion to the number of officers and men performing police duty in the parish of St. Bernard. Now if the people of St. Bernard are required to pay equally and uniformly for the expenses of the officers and men employed in police duty in said parish, what is the difference as to how the State has employed or authorized the employment of said policemen?

Whether the State selected as her agent for the administration of

police, the police jury, or created a special corporation, the board of Metropolitan Police, for the purpose of employing men and administering this part of government, is immaterial. It is a matter of legislative discretion. So plaintiff is not required to pay an unequal tax for the expenses of policemen actually employed for the public welfare in the parish of St. Bernard, he has no cause to complain; none of his constitutional rights have been violated.

The other questions raised by plaintiff are sufficiently answered in the written opinion of the judge *a quo* and nothing further need be said in regard to them.

Judgment affirmed.

No. 4373.

LOUIS DUFILHO v. HENRY MAYER.

The defendant being a possessor in good faith owes rent only from the institution of this suit, and is entitled to his claim for the value of the improvements against the owner of the property from the time he made them, with legal interest.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. L. Tissot*, for plaintiff and appellee. *Budd & Grover*, for defendant and appellant.

LUDELING, C. J. This is a petitory action for three lots of ground and the improvements thereon and rents or damages, against the defendant, who is alleged to be a possessor in bad faith.

The defendant filed a general denial, and further alleged that he purchased the property from Henry Zander, by act passed before A. Dreyfous, notary of this city, in 1867; that Zander had bought from F. Lacroix in 1866, by act passed before A. E. Bienvenu; that Zander and Lacroix were in full possession of the property from the date of their respective purchases. That he has improved the buildings on said lots and made other repairs, and made a fence and other improvements, worth five hundred and ninety-eight dollars. He alleges that Zander is bound in warranty to him, and Lacroix to Zander; and that he is specially subrogated to the rights of Zander against Lacroix, and prays for judgment accordingly, in the event judgment should be rendered against him for the property. He further prayed that the plaintiff's demands be rejected with costs.

There was judgment in favor of the plaintiff for the lots, and for \$150 general damages, up to September, 1867, and ten dollars per month thereafter, until plaintiff be put in possession; and allowing Mayer three hundred dollars for the improvements.

Mayer has appealed.

It appears that in 1866 Lacroix sold the lots to Zander, who sold them to Mayer in 1867, by notarial acts in due form, and that both

Zander and Mayer took actual possession of the property and exercised acts of ownership over the same.

It appears further that after the sale to Zander, and before his sale to Mayer, Lacroix told Zander he had sold the property to him in error, having previously sold the same property to another, and offered to return to him the money and notes executed, given for the property, but Zander refused to take it, and sometime after this Zander sold to Mayer. There is no evidence to show that Mayer knew of this. After Mayer bought he made useful improvements and necessary repairs on the property, which are proved to be worth three hundred dollars. It is also proved that after Mayer had bought he received a letter from the attorney of plaintiff stating that the property belonged to plaintiff, and that damages and rents would be claimed of him for the property. The plaintiff has proved his title to the property.

Both Zander and Mayer held under titles perfect in form, and there is nothing in the record to show that they did not believe they were the owners.

"The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." C. C. 3451.

We think, therefore, that Mayer was a possessor in good faith, and owes rents only from the institution of the suit. C. C. article 503. And we think the evidence will not authorize more than eight dollars per month as rents. The defendant is clearly entitled to a judgment against his vendor in warranty for the price paid, and Zander is entitled to a judgment against Lacroix for the price he paid, with legal interest; and under the act specially subrogating Mayer to Zander's rights against Lacroix there should be judgment in favor of Mayer against Lacroix for the price paid by Zander. And he is entitled to his claim for the value of the improvements against the owner of the property with legal interest from the time he made them.

It is therefore ordered that the plaintiff be declared the owner of the lots described in the petition with the improvements thereon, and that he have judgment against the defendant Mayer for rents at the rate of eight dollars per month from judicial demand and costs of the lower court. It is further ordered that the defendant Mayer have judgment against his vendor, Henry Zander, for six hundred and eight dollars, with five per cent. per annum interest from the twenty-eighth of February, 1867; and in default of said Zander returning to said Mayer his notes given for the credit portion of the price, within thirty days after this date, that he have judgment for the further sum of two

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hundred and two dollars, with six per cent. per annum till paid, and costs of suit.

It is further ordered that Henry Mayer, subrogated to the rights of Henry Zander, recover judgment against Francois Lacroix for forty-eight dollars, cash portion of the price, with five per cent. per annum interest till paid; and in the event the said Lacroix should fail to return the notes given Zander for the credit portions of the price, within thirty days after this judgment, that he recover judgment against Lacroix for two hundred and eight dollars, the amount of said notes, with six per cent. per annum interest from the date of the sale to Zander, and costs of suit. It is further ordered that appellees pay costs of appeal.

No. 5379.

THE STATE OF LOUISIANA v. HENRY HAMILTON.

The judge *a quo* was asked to charge the jury that "if the jury believed that the defendant Hamilton was handcuffed at the time he was presented to the deceased for recognition, then such recognition was not made in conformity to law and must be rejected." The judge did not err in refusing the charge. The fact that the defendant may have been handcuffed, could have no effect upon the ability of the party wounded to recognize him.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Atocha*, J. Criminal case. *A. P. Field*, Attorney General, *John McPhelan*, district attorney, for the State, appellee. *S. J. A. Smith*, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment sentencing him to hard labor for life in the State penitentiary for the crime of murder. On the trial in the lower court, his counsel asked a juror, presented and sworn on his *voire dire*: "Do you believe in a future state of rewards and punishments?" To which the State objected and the objection was sustained, but the ground of objection is not contained in the bill of exceptions, and besides the name of this juror does not appear among those by whom the defendant was tried. Under these circumstances the bill can not avail the defendant. But we are not aware that the question presents a legal cause for disqualifying a juror, and we have not been referred to any authority shown by defendant's counsel.

The judge *a quo* was asked to charge the jury: "That if the jury believed that the defendant Hamilton was handcuffed at the time he was presented to the deceased for recognition, then such recognition was not made in conformity to law and must be rejected."

We think the judge did not err in refusing the charge. There is no law, within our knowledge, that makes a recognition under such circumstances objectionable. The fact that the defendant may have been handcuffed, could have no effect upon the ability of the party wounded to recognize him. We can find no error in the proceedings below requiring our action.

Judgment affirmed.

No. 3325.

MATHILDE MORRISON v. CITIZENS' BANK OF LOUISIANA and SAM SMITH & Co.

The plaintiff's claim is the result of a judgment which she obtained against her father, which judgment gives to her a legal mortgage over all his immovable property, dating from the third of May, 1852. This judgment was inscribed on the sixteenth of April, 1868.

A judgment which recognizes a minor's claim and mortgage, and which is duly recorded prior to the year 1870, does not come under the 123d article of the constitution which declares "that tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, 1870, unless duly recorded," and the act No. 95 of the Legislature of 1869, which provides for carrying out the provisions of the aforesaid article of the constitution.

When the article 123 of the constitution was adopted, the plaintiff's rights were perfect. She had a tacit mortgage upon her father's property, and the evidence was a duly recorded judgment of a competent court. There was no necessity for her to record it again. The article did not refer to her; she had complied with its requisites.

The rendering and signing of the plaintiff's judgment against her tutor, out of term time, did not, under the circumstances of the case, make it a nullity. It was agreed between the parties that the judge who tried the case should take it under advisement, render judgment, and sign it after the court should have adjourned. The parties were competent to make the agreement, and the judgment having been rendered in conformity to it, is good.

The judgment of separation of property and dissolution of the community in a suit instituted by plaintiff's mother against her father, having never been executed or sought to be executed, was nothing, and did not affect the community.

The proceedings in which the plaintiff's father obtained leave of the court to give a special mortgage in lieu of the tacit one existing in favor of the minor, did not become final, because the mortgage after it was executed was not approved by the judge, and because it was not recorded in the parish where the property mortgaged was situated until after this suit was instituted, some ten years after the mortgage was given.

The vendor's privilege has no priority in this case over the plaintiff's tacit mortgage. The mere filing of the act of sale, which was passed in New Orleans, and the recording of it among the notarial acts of his office by the recorder of the parish of Pointe Coupee, was not the recording required by law in order to give it effect as a mortgage, or to preserve the privilege which it carried with it. Although subsequently recorded in the proper books of the recorder of mortgages, it was not done within the time required to keep in existence the vendor's privilege, but operated only as a mortgage from the time it was recorded.

Plaintiff's tacit mortgage attached to the property purchased by her father from the day he purchased. The vendor's privilege was superior to the tacit mortgage so long as the privilege existed; but when the privilege ceased to exist, then the tacit mortgage was in force against it, and it had its effect without being recorded. When therefore the act of sale was recorded, it operated as a mortgage from that date, but at that time the property was burdened with the plaintiff's tacit mortgage, and the conventional mortgage was second to it in rank.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Charles E. Schmidt*, for plaintiff and appellant. *A. Pitot, Farrar and Montgomery*, for the Citizens' Bank of Louisiana, defendant and appellee. *T. Hunton, Cooley and E. Phillips*, for Sam Smith & Co., defendants and appellees.

MORGAN, J. The plaintiff alleges that she is a creditor of her father, Jacob H. Morrison, for sums amounting in the aggregate to \$16,275 22, exclusive of interest; that said indebtedness is established by a judgment rendered on the first April, 1868, by the Seventh Judicial District

Court, parish of Pointe Coupee, in favor of petitioner and her sister Camille on their opposition to the account of tutorship rendered by their father; that by said judgment his aggregate indebtedness to herself and sister was fixed at \$17,994 20, exclusive of interest, half of which was due to petitioner, and the other half to her said sister; that the latter having died since the rendition of said judgment, petitioner's share thereof, owing to the portion by her inherited of her sister, amounts as aforesaid to \$16,275 22, besides interest. That for the payment of the said sum, in capital and interest, the petitioner has a legal mortgage on all the immovable property of the said J. H. Morrison, dating and taking effect from the third day of May, 1852, as recognized and decreed in the judgment aforesaid, which was duly recorded in the books of the recorder of mortgages for the parish of Pointe Coupee, and stands inscribed thereon since the sixteenth April, 1868.

Subsequent to the year 1852, Morrison purchased several tracts of land in the parish of Pointe Coupee. In February and April, 1860, these lands were mortgaged to the Citizens' Bank.

One of the tracts of land was purchased from G. P. Ware, on the seventh August, 1856. Part of the purchase price was represented by notes of which Smith & Co. held \$24,170 66.

Plaintiff prays that the plantation referred to be decreed subject to her mortgage; that her mortgage be declared to be superior in rank to any and all the mortgages which the Citizens' Bank and Smith may have, and that she be entitled to enforce her mortgage claims by the seizure and sale of the plantation in preference to, and with priority over, any claims held or set up by the bank and Smith & Co.

The bank answers :

First—That the plaintiff's judgment against her tutor is null, because it was rendered and signed in vacation.

Second—That if good between the parties, it was rendered by consent, against law and facts, and for the purpose of defeating the respondent's mortgage claim, and that they are not bound by the same. Further answering, the bank avers the validity of its own mortgage, and denies the tacit mortgage claimed by the plaintiff.

Smith & Co. make substantially the same defense, alleging further that the mortgage they hold results from the sale of the property by Ware to Morrison, which entitles them to the vendor's privilege, which, they say, ranks the minors' mortgage.

Subsequently both defendants filed a peremptory exception to the plaintiff's demand, on the ground that she has no cause of action, the same having been destroyed by the nonrecording of her mortgage according to law.

First—As to the rendition and signature of the judgment out of term

time: It was agreed that the judge who tried the case should take it under advisement and render judgment and sign it after the court should have adjourned. The parties were competent to make the agreement, and the judgment having been rendered in conformity therewith is good. The cases of *Simonds v. Leovy*, 21 An. 306, and *Hernandez v. James*, 23 An. 483, are not authority for the defendants. In neither of them had the judgment been rendered and signed in vacation by consent.

Second—As between the parties, whether rendered by consent or not, the judgment was good. Collusion or fraud would destroy its effects as to third parties, but the collusion or fraud must be established by those who allege it. Of this there is no evidence. It is shown on the part of the defendants that the mother of the plaintiff sued her husband (plaintiff's father) for a separation of property, and that she obtained judgment against him dissolving the community, and condemning him to pay her a sum which would make the plaintiff's share in her estate a little over \$2000. But this judgment was never executed, or sought to be executed. If not executed, or sought to be executed, it was nothing, and did not affect the community. 23 An. 572; 1 An. 308; 11 La. 533; 1 R. 432; 4 An. 513; 12 An. 193.

Third—The next question is, has the plaintiff a tacit mortgage? It is claimed not, by the defendants, because, they say, her father gave a special mortgage in lieu thereof.

On twenty-ninth December, 1859, the plaintiff's father applied to the court for permission to substitute a special mortgage for the tacit mortgage which his children had to secure their rights, the property upon which he proposed to place the special mortgage being described in his petition. A family meeting was ordered to be convened for the purpose of advising whether or not the property offered to be specially mortgaged was sufficient to secure the minors' rights in principal and interest.

On the same day the family meeting convened. They declared that the property offered was sufficient, and that they had no objection that the general mortgage should be changed into a special mortgage upon the property described in the tutor's petition. These proceedings of the family meeting were duly homologated by the judge, and the tutor, by the judgment of homologation, was allowed to give the special mortgage on the property offered by him. This on the sixteenth January, 1860.

On the seventeenth January, 1860, the mortgage was duly executed, and it was recorded on the same day.

But here it is contended that the special mortgage, after it was drawn up, was never presented to the judge for his acceptance and sanction,

and that this is contemplated by the act of 1830 and by article 3309 of the Code of 1825.

The act of 1830 declares that in all cases where special mortgages shall be given by curators or tutors in lieu of the legal mortgage existing in such cases, as recognized by law, it shall be the duty of the judge receiving such special mortgage to cause the property proposed to be mortgaged to be appraised by experts in the same manner as is provided when adjudications of the property of minors are made to the surviving father or mother, and the said judge shall in no case accept the said mortgage unless the value of the property so appraised shall exceed, exclusive of all prior liens, privileges or mortgages, the amount of the debts or rights of the minors intended to be secured by the said special mortgage, by at least twenty-five per cent, in addition to the amount of the said matter, and including all interest which may probably accrue."

Article 3309 of the Code of 1825 declares that "the judge shall receive the special mortgage offered if he thinks it sufficient, and with the advice of the family meeting in the case of a minor or person under interdiction."

It remains for us now to determine whether the requirements of the laws which we have quoted have been complied with in the present case. Counsel for appellant contends that they have not, because the special mortgage was never presented to the judge for his acceptance and sanction. His position is, that after the mortgage was given it should have been accepted. In support of his position he cites the case of *Lesassier v. Dashiell*, 17 La. 204. In that case "no experts were appointed, no previous liquidation of the vendor's rights was made, and the act of special mortgage was passed by a simple notarial act, which never was accepted by any one, not even by the under tutor; it was not received by the judge as required by article 3309 of the Louisiana Code, and never obtained the definitive sanction of the court of probates, so as to give it the effect contemplated by the decree of homologation."

In the present instance the rights of the minors had, as it is recited in the petition of the tutor when he asked leave to grant a special mortgage, been ascertained by a judgment rendered on the thirtieth April, 1845, by the Fifth District Court of New Orleans, the then domicile of the parties. The property which the tutor desired to mortgage was described. A family meeting was convened for the purpose of deciding whether the interests of the minors would be protected. Experts were appointed to determine the value of the land proposed to be mortgaged. The family meeting assembled; the experts reported, and it was determined that the security offered was sufficient to protect

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the minors' interest, and a mortgage thereon, to take the place of the general one, was recommended. These proceedings of the family meeting were submitted to the judge, who approved them and ordered the mortgage to be executed and accepted. It was executed, and it was recorded. In point of fact, therefore, every essential of the law was complied with. The only matter for discussion is, whether after all the proceedings above related had taken place, it was still indispensably necessary that the mortgage, after having been executed, should have been presented to the judge, and been by him accepted before the general mortgage was thereby released. We think not. We think that when the judge, under the facts of this case, ordered the mortgage to be executed, he accepted it in the sense of the law, and that all the requirements of the statutes for the protection of minors were complied with. An inspection of the proceedings would, we think, justify any one who proposed to deal with plaintiff's tutor, in believing that no general mortgage rested upon his property.

This view of the case renders it unnecessary that we should examine the other questions presented.

Judgment affirmed.

ON REHEARING.

MORGAN, J. The issues presented by both plaintiff and defendants are sufficiently set forth in the opinion heretofore prepared by us.

In that opinion we stated that the plaintiff's father was, on the sixteenth of January, 1860, allowed to give a special mortgage on the property offered by him; that on the seventeenth of January, 1860, the mortgage was executed and was recorded on the same day. In this there was error. The mortgage was executed in the parish of Pointe Coupee, and was recorded in that parish on the same day. The property subjected to the mortgage was situated in the parish of West Feliciana. It was not registered in that parish until some ten years after its date, and subsequent to the institution of this suit.

The plaintiff's claim is the result of a judgment which she obtained against her father, which judgment gives to her a legal mortgage on all his immovable property dating from the third of May, 1852. This judgment was inscribed on the sixteenth of April, 1868. Plaintiff contends that this is a recognition of her tacit mortgage; that it dates back to the year 1852, and that it takes precedence over the bank's mortgage, acquired subsequent thereto. The bank contends that it was only a judicial mortgage, if, in reality, it has any existence at all, "because the recording of her judgment does not cover the default of inscription of her mortgage before the first of January, 1870."

The question we are called upon, for the first time, to decide is

whether a judgment which recognizes a minor's claim and mortgage, and which is duly recorded prior to the year 1870, comes under the one hundred and twenty-third article of the constitution, which declares that "tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, 1870, unless duly recorded," and the act No. 95 of the Legislature of 1869, p. 115, which provides for carrying out the provisions of the article of the constitution quoted.

We think not. The object of the framers of the constitution in adopting that article is apparent. It was to do away with the effects of mortgages not recorded—those mortgages which rested upon property and which were out of sight, and against which protection was almost impossible. The convention therefore declared that no tacit mortgage should rest upon any property in the State after the year 1870, unless it had been duly recorded.

Now, when this article was adopted the plaintiff's rights were perfect. She had a tacit mortgage upon her father's property, and the evidence thereof was a judgment of a competent court, which judgment was duly recorded. There was no necessity for her to record over again the judgment which she had obtained. The constitution says that tacit mortgages shall have no effect after a certain date unless duly recorded. Here her mortgage was duly recorded, and this is all that it was necessary she should do. The article did not refer to her. She had complied with its requisites. It only applied to mortgages which had not been recorded.

Upon the two first points discussed in our former opinion our mind remains unchanged.

The next point to determine is whether the plaintiff had a tacit mortgage upon her father's property. Defendants say she had not, because a special mortgage had been substituted therefor. The facts and circumstances under which the special mortgage was given are detailed in our former opinion, and it is needless to restate them, except to remark that on the twenty-ninth of December, 1859, plaintiff's father asked leave of the court to grant a special mortgage to take the place of the tacit one; that his petition was submitted to a family meeting, who recommended it; that the property sought to be mortgaged was designated, and that the proceedings of the family meeting which recommended the acceptance of the same and the sufficiency of the security were homologated. The mortgage was executed and it was recorded. It was executed in the parish of Pointe Coupee and recorded on the same day. But the property mortgaged was situate in the parish of West Feliciana, and it was not recorded there, as we have seen, until years after its execution.

Plaintiff contends that all the proceedings which resulted in this mortgage were worthless; that her tacit mortgage was never released, because the judge never accepted the same. In other words, she contends that after her father had prayed to be allowed to execute this mortgage; after a family meeting had recommended it; after the proceedings of the family meeting had been approved; after the judge had ordered the execution of the mortgage, it was still necessary that the judge should approve of its execution; and, in default thereof, that the whole proceedings are null, and that her tacit mortgage remained undisturbed.

This question was discussed in the opinion heretofore delivered, to which we refer. We there came to the conclusion that the law had been complied with. Further examination and reflection has satisfied us that we erred. The proceedings did not become final because the mortgage, after it was executed, was not approved by the judge, and because it was not recorded in the parish where the property mortgaged was situate until after this suit was instituted, some ten years after the mortgage was given.

In so far, then, as the Citizens' Bank is concerned, our former judgment was erroneous. Up to this point the same reasoning will apply, as well to Smith & Co. as to the Bank. But Smith & Co. say they hold notes due by the plaintiff's father as part of the purchase price of the property now sought to be subjected to the minor's mortgage, and that as the property was purchased by the father subsequent to the plaintiff's mother's death, the vendor's privilege attaches, and that it is not affected by the tacit mortgage.

The sale from Ware to Morrison was made on the seventh August, 1856. The sale was made by public act, passed before a notary public in New Orleans. It was sent to the parish of Pointe Coupee, where the property sold is situate. The recorder certifies that it was recorded among the notarial acts of his office, but that he finds no inscription of the same in any of the books of mortgages.

The mere filing of the document and recording it among the notarial acts in his office was not the recording required by law in order to give it effect as a mortgage or to preserve the privilege which it carried with it.

The act was properly recorded in the books proper of the recorder of mortgages, on the twelfth of June, 1866.

"Privileges are valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law." C. C. 3273 [3240.] At the time of these transactions the law was that privileges were valid against third persons from the date of the act, if it had been duly recorded, that is to say, within six days of the date,

if the act has been passed in the place where the registry of mortgages is kept, or adding one day more for every two leagues from the place where the act was passed to that where the register's office is kept. C. C. 3240.

Article 3241 provides that when the act on which the privilege is founded has not been recorded within the time required in the preceding article, it shall have no effect as a privilege; that is to say, it shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage in the meantime, which they have recorded before it; it shall, however, still avail as a mortgage, and be good against third persons from the time of its being recorded. And the law now is (C. C. 3274) that no privilege shall have effect against third persons, unless recorded in the manner required by law, in the parish where the property to be affected is situated. It confers no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was entered into.

The act of sale was not recorded within the time prescribed by the law as above quoted. The vendor's privilege, therefore, does not exist.

But the recording of the act operated as a mortgage from the time it was recorded. It was recorded on the twelfth June, 1866. Plaintiff's judgment against her father was recorded in 1868. When did her mortgage attach? From the date of the recording of her judgment? or from the date when her father's indebtedness attached?

Plaintiff's tacit mortgage attached to the property purchased by her father from the day he purchased it. *Lombas v. Collet*, 20 An. 79. The vendor's privilege was superior to the tacit mortgage, so long as the privilege existed; but when the privilege ceased to exist, then the tacit mortgage was in force against it, and it had its effect without being recorded. When, therefore, the act of sale was recorded, it operated as a mortgage from the date upon which it was recorded, but at that time the property was burdened with the plaintiff's tacit mortgage, and the conventional mortgage was second to it in rank.

It is therefore ordered, adjudged and decreed that the judgment heretofore pronounced by us be set aside, and it is now ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed.

And it is further ordered, adjudged and decreed that the plaintiff, for the amount of her rights and claims against her father, Jacob H. Morrison, to wit:

First—For the sum of \$10,691 55, with five per cent. interest per annum on \$4178 85 from the third of February, 1857, until paid;

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on \$1350 51 from the eighteenth December, 1861. until paid; on \$2138 30 from twenty-second of February, 1863, until paid; and on \$3024 14 from the first of April, 1868, until paid; for which sum of \$10,691 55 she is entitled to enforce the payment by execution upon the property described in her petition; and

Second—For the eventual payment to her of the sum of \$5583 67, amount of which her father has inherited the usufruct, and that for all said sums and interest the legal mortgage of the plaintiff, and which is now recognized and adjudged to exist on the property of Jacob H. Morrison and which affects the property described in the petition, be decreed to be superior in rank to the mortgages which the Citizens' Bank and Samuel Smith & Co. may have, and to any privilege they pretend to have on said property; and it is further ordered, adjudged and decreed that plaintiff is entitled to enforce her said mortgage claims by the seizure and sale of said property in preference to and with priority over any claims held or set up by the said Citizens' Bank and Samuel Smith & Co., and that defendants pay costs in both courts.

No. 4036.

A. ROOS & CO. v. MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

It is a settled question that in an action on a valued policy of insurance the plaintiff is not put on proof of his interest in the object insured by a plea of the general issue.

In this case, however, the evidence shows that the plaintiffs had an insurable interest in the stock of goods belonging to Marks, on which they took a fire policy. They furnished Marks with goods, and upon their credit and responsibility enabled him to obtain goods from others and subsequently paid for them. The plaintiffs' sole reliance, it seems, for payment, rested upon the fidelity and success of Marks' business. The danger of loss by the destruction of the store and Marks' stock of goods on hand constitutes a sufficient interest in the plaintiffs to sustain the policy.

The plea that the policy became void by the plaintiffs taking insurance on the same property in the New Orleans Mutual Insurance Association without notice to defendants is not tenable. The other insurance taken on the property was in the interest of a different party.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. E. H. McCaleb*, for plaintiffs and appellees. *A. Voorhees*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs sue on a fire policy taken out by them on a stock of goods belonging to one J. Marks then keeping a store at Meridian, Mississippi, and selling such goods as are usually kept in country stores. This insurance was made subject to what is called "the three-fourths country clause." The plaintiffs allege in their petition "that at the time of effecting said insurance and taking out said policy on the stock of trade therein mentioned, your petitioners had an insurable interest in said property, and that they were also the

agents of J. Marks, the party therein mentioned, and took out said policy for the purpose of covering their own interest as well as the interest of their said principal."

The defendants deny the allegations contained in the plaintiffs' petition, except the execution of the policy of insurance, and specially aver that the policy is null and void by reason of the violation by the plaintiffs of the clause or warranty that "if the said insured or their assigns shall hereafter make any other insurance on the same property, and shall not within all reasonable diligence give notice thereof to this corporation and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no effect." The defendants aver that in violation of this clause in the policy the plaintiffs did, on the twelfth of September, 1870, insure in the New Orleans Mutual Insurance Association the same property without having given notice thereof to the defendants, who did not cause any indorsement to be written on the said policy, and never made any acknowledgment of the same in any manner; that the policy issued by them became therefore null and without effect. The plaintiffs had judgment in their favor for \$3099 69 with legal interest from second September, 1871, until paid. The defendants appealed. Frank & Haas, another commercial firm, took out on the same day, twelfth September, 1870, a policy of insurance to the amount of four thousand dollars on the same stock of goods from the New Orleans Mutual Insurance Association, the same being effected, as it seems, through J. Marks as their agent. The policy recites that "the New Orleans Mutual Insurance Association * * * do insure Frank & Haas, account of J. Marks, agent." After the fire occurred and the loss was established, this company paid the amount of the insurance, and the receipt of the money written across the face of the policy is signed J. Marks, agent.

The defense in this case is placed solely on the ground that a double insurance was made by the plaintiffs without notice to the defendants. The counsel of the defendant objects that Roos & Company have not set out in their petition the value and amount of their interest in the property insured. This is answered by the plaintiffs that an insurable interest in them not being denied in their pleadings and not being put at issue, they were not required to set out the value and amount of that interest. In the case of *Kathman v. The General Mutual Insurance Company*, 12 An. 35, and in that of *Kennedy v. New York Life Insurance Company*, 10 An. 809, it was settled, after a very elaborate examination of the subject, that in an action on a valued policy of insurance the plaintiff is not put on proof of his interest in the object insured by a plea of the general issue.

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However this may be, the evidence clearly shows an insurable interest in the plaintiffs. They furnished Marks with goods, and, upon their credit and responsibility enabled him to obtain goods from others and subsequently paid for them. The plaintiffs' sole reliance as it seems, for payment, rested upon the fidelity and success of Marks in business. The danger of loss by the destruction of the store and Marks' stock of goods on hand constituted in our opinion a sufficient interest in the plaintiffs to sustain the policy.

The plea that the policy became void by the plaintiffs' taking insurance on the same property in the office of the New Orleans Mutual Insurance Association without notice to the defendants is not tenable. The plaintiffs took no insurance from that company. An insurance was taken from it on the same property, but in the interest of a different party. Roos & Co. had no interest in that insurance. Frank & Haas were the insured parties in that case. The money paid on that policy was paid to them. Marks, it seems clear, had no interest or rights under either policy. In the case of Frank & Haas he acted as their agent. In the case of Roos & Co. the policy shows that they were the only parties insured. Therefore the objection that the interest of Marks in that policy was transferred to plaintiffs is without weight. Marks had no interest under that policy to transfer. The act of transfer amounted to nothing. The loss was fully established, and we conclude from the entire evidence that the decree of the lower court was properly rendered.

Judgment affirmed.

Rehearing refused.

Justices Howell and Morgan dissent in this case.

No. 5688.

GEORGE WAILES AND S. MATHEWS v. SUCCESSION OF JAMES N. BROWN.

The right of an attorney to remuneration depends on a contract or appointment, and he can not recover from one who did not employ him, however valuable may be the result of his services to such person.

APPPEAL from the Fifth Judicial District Court, parish of Iberville. *Dewing, J. E. B. Talbot*, for plaintiffs and appellees. *Barrow & Pope*, for defendant and appellant.

HOWELL, J. The plaintiffs, who are attorneys at law, sue the succession of James N. Brown for one thousand dollars for professional services, alleged to have been rendered to said succession, at the request of one of the heirs in the suit instituted by her for the removal

of the dative testamentary executor, entitled: "Mary E. Brown and husband v. James A. Ventress," which resulted successfully.

The answer is that the alleged services were rendered at the request and for the benefit of the plaintiffs in said suit, which was instituted and carried on against the express wishes of the other heirs, who joined in the defense thereof.

Judgment was rendered in favor of plaintiffs for six hundred dollars, and both parties appealed.

On the trial below the plaintiffs offered the opposition of one of the heirs to an account filed by the dative testamentary executor before his removal, and extracts from the testimony thereon of said opponent and that of another heir, both of whom had opposed the removal, in order to prove that they did so in error and under the influence of false representations made to them by said dative testamentary executor of the correctness and faithfulness of his administration.

This evidence is in the record and, if admissible, it does not prove that the said heirs changed their position in the destitution suit and joined the plaintiffs therein. It seems from the evidence that the said heirs became aware of the alleged misrepresentations after the judgment of destitution was rendered.

The main question is, is the succession liable for this claim?

Plaintiffs rely on the case of *Friend v. Graham's administrator*, 10 La. 440, to maintain the affirmation. In that case the court said: "The removal of the curator inured to the benefit of the succession, i. e., the creditors and heirs, *qui sentit commodum, debet sentire et onus*. If the succession, after paying the creditors of the deceased, leave nothing for the heirs, the former will be exclusively benefited by the services of the plaintiffs. Should there be a surplus for the heirs, then the debts of the succession will be taken therefrom. In either case justice will be done.

The court of probates did not err in sustaining the claim of plaintiffs against the succession, although "the services (professional) were rendered at the request of some of the heirs."

This, it is contended, is overruled in the case of *Roselius v. Delachaise*, 5 An. 481, where the principle was established that the right of an attorney at law to remuneration depends on a contract (or appointment) and that he can not recover from one who did not employ him, however valuable may be the result of his services to such person.

This, we think, is the correct doctrine and the one which has since been followed. See 11 An. 596.

In reference to the case in 10 La., above cited, it may be said, that no one heir, as such, represents the succession, so as to bind it, and if he thinks his interest in the succession is of such extent or importance

as to warrant him in suing for the removal of the curator or other representative, he should bear the expense of the counsel employed by him for that purpose. He could hardly expect the succession to pay the fee if he failed.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of the defendant, with costs in both courts.

MORGAN, J., *dissenting*. In this case I dissent, and I will file my reasons therefor hereafter.

No. 5505.

CITY OF NEW ORLEANS v. S. P. RUSS.

The question in this case is not about taxing the lots of ground which belong to the Poydras Female Orphan Asylum, but about taxing the buildings and improvements thereon, placed there under a contract which makes them the property of the lessee and therefore liable to taxation thereon. There is no doubt about the right of the city to collect taxes on said property from the defendant.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George S. Lacey*, city attorney, and *S. P. Blanc*, assistant city attorney, for plaintiff and appellee. *Frank N. Butler, H. J. Grover* and *R. H. Marr*, for defendant and appellant.

LUDELING, C. J. This suit is to recover from defendant \$1150 75, with interest, being for the taxes of 1871, 1872 and 1873, upon the assessed value of the buildings and improvements on certain lots, which belong to the Poydras Female Orphan Asylum, and which lots were leased in 1856 to the defendant's transferrer for the term of fifty years. The defense is that the property belongs to the Poydras Female Orphan Asylum, and the property of that institution is exempt from taxation.

The best answer to this defense is the contract between the Asylum and R. W. Montgomery, through whom the defendant holds. Among other stipulations the act states that Montgomery binds himself "to place upon said lots buildings and improvements to the value of not less than nine thousand one hundred and fifty dollars," and the said asylum "agreed to purchase, at the expiration of this lease, such improvements as may be then upon said lots, at the value put upon them by two experts."

If the asylum has to buy these buildings it is certain they do not belong to them. One can not buy what already belongs to him.

But this is expressly admitted by the defendants, in admitting "that all the averments of the plaintiff's petition are true, except the allegation of defendant's liability."

The buildings and improvements on the lots being shown to belong to the defendant he must pay the taxes thereon. The case of *Connell v. Orphan Asylum and Dr. Campbell*, was a suit upon a paving contract. Such work is made a charge upon the proprietors of adjacent lands, by the city charter of 1856. It is, therefore, not in point; neither is the case of the *State v. Campbell*, 23 An. 445, as will appear from the opinion of the court. The court said "this is a suit against defendant to recover the State taxes for 1869, on a lot of ground forming the corner of St. Charles and Julia streets. * * * The answer is, the defendant is not the owner of the lot of ground described in the petition; that said lot belongs to the Poydras Female Orphan Asylum, and is by law exempt from taxation."

There is no question here about taxing the lots of ground which belong to the asylum, but the question is about taxing the buildings and improvements thereon, placed there under a contract which makes them the property of the lessee. We have no doubt about the right of the city to collect taxes on said property. Constitution, art. 118.

It is therefore ordered that the judgment of the District Court be affirmed with costs of appeal.

No. 3507.

THE CITY OF NEW ORLEANS *v.* NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

The joint resolution of the Legislature upon which defendant relies in this case and the title of which is: "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama," sufficiently discloses the object of the resolution. It is not therefore unconstitutional.

The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. The right of that body to grant the privilege to corporations or individuals to make and maintain wharves has long been settled. In this instance the State granted the right to the riparian owner. This is permissible. The grant was not a donation of public revenues to a private purpose. It was the control by the Legislature of a public servitude.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. George S. Lacey, A. C. Lewis, W. W. King*, for plaintiff and appellant. *J. A. Campbell*, for defendant and appellee.

LUDELING, C. J. This is a suit for \$764 20, for levee dues charged against the defendant, for barges and flatboats belonging to the company, and lying at the wharves of the company.

It is admitted the charges are correct if due by the defendant. It is admitted that the barges, etc., were moored at the wharf described in the resolution adopted by the General Assembly in March, 1869, which is situated in the Delord suburb of this city, and that the company was in possession of said wharf, under said resolution, during the

The City of New Orleans v. New Orleans, Mobile and Chattanooga Railroad Company.

period for which the charges are made; and that the barges, etc., were used in the business of the company.

The defense is that under said resolution of the General Assembly the defendant is exempted from wharfage dues for barges, etc., which land at the said wharf.

The city urges three objections to this joint resolution.

First—Its unconstitutionality, because its title does not declare its object, and because its provisions create an inequality in taxation.

Second—Because the Legislature has not the power to control the municipal wharves and levees, and the dues and charges arising therefrom.

Third—Because the Legislature transcended legislative power by donating public revenues to a private purpose.

The title of the resolution is, "A Joint Resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama." It gave the company the right to inclose and occupy for its purposes and uses, that portion of the levee batture and wharf in New Orleans, in front of the riparian property which the company had acquired. The act further exempted from the payment of wharfage and levee dues, vessels, etc., landing at said wharf with the consent of the company, and imposed the obligation on the company to maintain and keep in repair said wharf.

First—We think the title sufficiently discloses the object of the resolution. See 14 An. 7, *Williams v. Paysan*; 9 An. 329; 20 An. 196, *Police Jury v. Colomb*. There is no question of taxation in this case.

Second—The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. C. C. 453, 455, 458. The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled. 5 An. 661; 15 An. 577; 22 An. 545; 6 N. Y. 523; 26 N. Y. 287.

Third—In the case now under consideration, the State granted the right to the riparian owner. This is permissible. 1 Black. 1.

Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes, to wit: to facilitate the transaction of its business with the public. It was the control, by the Legislature, of a public servitude.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

WYLY J., *dissenting*. The defendants resist this demand of the city of New Orleans on an account of \$764 20 for levee dues, on the ground

mentioned in the statement of facts upon which the case was submitted in the court below. And it is as follows: "The defendants resist the payment by virtue of a joint resolution of the General Assembly of the State of Louisiana, approved March 6, 1869;" * * * which they claim exempts them from the payment of all levee and wharf dues to the city of New Orleans.

The plaintiff contends that this joint resolution is repugnant to article 114 of the constitution, and is therefore void.

The title is, "A Joint Resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama." The statute provides: "That there shall be and is hereby granted to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, the right to inclose and occupy for its purposes and uses, in such manner as the directors of said company may determine, that portion of the levee batture and wharf of the city of New Orleans, between the street laid out between Pilie street and the Mississippi river, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street) of the batture rights owned by said company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf of said company, or any steamships or other vessels using said wharf by and with the consent of said company, and not receiving or discharging cargo at, or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the city of New Orleans; said wharf shall be maintained and kept in repair by said company. That all laws and parts of laws, and all ordinances and parts of ordinances conflicting with the provisions of this joint resolution are hereby repealed, so far as they affect the provisions of this joint resolution."

There is nothing in the title of the law indicating the object to exempt any ships or other vessels landing at the port of New Orleans from the payment of levee and wharfage dues. In the title no hint or clue is given showing the object of the law to confer any advantage on the defendants over any other persons, in regard to exemption from paying levee dues. Nor does it disclose the purpose of allowing the defendants to inclose and have the exclusive right to occupy a part of the levee and wharf of the city of New Orleans.

I think the exemption claimed should not be allowed, because the law granting it is repugnant to article 114 of the constitution and is void. I therefore dissent in this case.

No. 5298.

CITY OF NEW ORLEANS et als. v. JAMES STAFFORD.

It does not follow because the city has leased the markets for the year 1874 that it loses all interest in the management of them and in seeing that the laws and regulations concerning them are carried into effect. The act of 1874 makes it the duty of the city through its administrators to take measures for carrying out the provisions of the act regulating private markets, and in any issue that may arise in acting under this authority the city would be competent to stand in judgment.

The Legislature had the power to make the regulation, which it has made by the act of the twenty-sixth February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market. This power arises from the nature of things, and is what is termed a police power. It springs from the great principle "*salus populi suprema est lex.*" There is in the defendant's case no room for any well grounded complaint of the violation of a vested right, for if he really possessed the privilege of keeping a private market, that privilege was acquired subordinately to the right existing in the sovereign to exercise the police power in regulating the peace and good order of the city, and in providing for and maintaining its cleanliness and salubrity. The act of 1874 is not unconstitutional.

The act of the twenty-sixth February, 1874, is not in violation of article 114 of the State constitution. The act has but one object; that one object is expressed in the title. The words "and for other purposes," are in the title to this act meaningless, for there is nothing else treated of in it besides the regulation of private markets.

The act of 1874 abolishes all private markets located within less than twelve squares of a public market. To that extent it repeals the act of 1866, under which the defendant sets up its title.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Lacey & Butler*, for plaintiffs and appellants. *E. Filloul*, for defendant and appellee.

TALIAFERRO, J. It is charged against the defendant that in open violation of existing laws and regulations appertaining to the markets of the city for vending provisions of various kinds for the sustenance of the inhabitants, he is keeping a private market, at which he is selling meats and other articles of provisions contrary to the said laws and municipal regulations, and thereby endangering the peace and good order of the city, putting in jeopardy the cleanliness and salubrity and the health and quietude of the inhabitants thereof, and furthermore subjecting the said city to a pecuniary loss and injury in an amount greatly in excess of one thousand dollars. The plaintiff prayed that an injunction be granted restraining the defendant from keeping open and conducting a private market, as, alleged by the petitioner, the defendant is doing in violation of law. A rule was served upon the defendant to show cause why the injunction prayed for should not be granted, and the defendant answered: That the act of 1874 of the Legislature, providing that no private market should be permitted at any place in the city within the distance of twelve squares of a public market, is unconstitutional and void, because it was procured by bribery and corruption; because its title does not disclose or indicate its purposes; that it violates the constitution of the United States; because it creates an involuntary servitude; that it abridges the privi-

leges and immunities of the citizens; that it deprives them of their property without due process of law. The defendant contends that having taken his license under the act 131 of 1866 he is entitled to keep a private market at the corner of St. Peter and Decatur streets during the space of one year, beginning January 1, 1874, and ending thirty-first of December, 1874; that this right having once vested it can not be taken away. He further contends that the city is without interest, having sold the revenues of the markets for the year 1874.

The application of the plaintiff for an injunction was dismissed at his costs, and the plaintiff has appealed.

The act of the Legislature authorizing private markets for the sale of meats, fish, poultry, etc., was passed in 1866; that act directs that keepers of private markets shall pay the same license that is required from retailers of provisions. The words of the statute are: "From and after the first of January, 1867, it shall be lawful for all persons, after they have obtained the license required for retailers of provisions, to open, and keep open at all proper hours of the day, private markets, stores, or stands in any part of the city of New Orleans for the sale of meats, game, poultry, vegetables, fruit and fresh fish, subject to the general sanitary ordinances of the City Council."

By the act of 1870, enlarging the limits of the city of New Orleans, and to provide for the government and administration of the affairs of the city, power is granted to the city to establish market places; and through its department of commerce to have general superintendence of all matters relating to markets. The City Council is vested with full power and authority to make and pass such by-laws and ordinances as are necessary and proper "to regulate and preserve the peace and good order of the city and provide for and maintain its cleanliness and salubrity not inconsistent with any law relating thereto." On the second December, 1873, the City Council passed an ordinance making the license for private markets \$300. On the twenty-sixth of February, 1874, the defendant in this case took out from the State a wholesale dealer's license on the payment of one hundred dollars. This license was taken out near three months after the passage of the city ordinance requiring a license of three hundred dollars from the keepers of private markets. In the same ordinance the license of wholesale dealers is fixed at one hundred dollars. If the defendant was bound to take a license from the city for keeping a private market it is clear that he has not done it. But he relies upon the license from the State under the statute of 1866. This statute, as to the amount of the license fixed for private markets, is not quite definite—the license is to be that which is paid by "retailers of provisions." We do not find from the record nor from the statutes of 1866 what the

amount of that license was. We assume, however, that the defendant holds that his license as a wholesale dealer covers it whatever it may be. Considering the act of the Legislature of 1866, together with the ordinance of the city of second December, 1873, passed more than two months before the date of the defendant's license, we can not but consider his claim to a license for the year 1874 at best as very questionable. It is not important that we should pass directly upon the question. A prominent ground of defense, and one upon which the judge *a quo* seems to have laid much stress, is that the city is without interest in the matter, having leased or farmed out the markets for the year 1874. We do not see that it follows because the city has leased the markets for the year 1874 it loses all interest in the management of them, in seeing that the laws and regulations concerning them are carried into effect. The act of 1874 makes it the duty of the city through its administrator to take measures for carrying out the provisions of the act regulating private markets, and in any issue that may arise in acting under this authority the city would be competent to stand in judgment.

We pass now to the consideration of the most important question raised in this controversy. Has the Legislature the power to make the regulation which it has made by this act of twenty-sixth February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market? This question, we think, must be answered in the affirmative. And the power arises from the nature of things, and is what is termed a police power. It springs from the great principle, "*salus populi suprema est lex.*" There is in the defendant's case no room for any well grounded complaint of the violation of a vested private right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. By way of illustrating this necessarily existing power to regulate the number, location and management of markets, take the city of New Orleans, in a warm climate, located in a low district of country, surrounded by marshes and swamps, which, in the hot season, under favorable conditions, envelopes its large population in a malarious atmosphere. Under such circumstances the danger of epidemics becomes imminent. It behooves the city authorities at such periods to be on the alert to obviate local causes of disease within the limits of the city. Among such causes the decay of animal and vegetable matter is a prominent one. The markets, therefore, must on that account be strictly attended to, and such measures adopted in regard to them

as, in the judgment of the proper authorities, the public health may require. Suppose under such a condition of things it should be found necessary as a sanitary regulation to reduce the number of markets, to abolish some of them, and thereby avoid their becoming causes of disease. Suppose the lessee of a public market and the keeper of a private market should find the markets under their control abolished, closed or suspended, from considerations of public security and benefit, before the expiration of the time for which their licenses were to continue; could they be sustained by law in a demand to be permitted to continue and keep open the markets they had charge of, on the pretense that they had a vested right to keep them open? Surely not. Their private benefit and advantage would have to yield to the public advantage. It would be a perversion of the principles of organized society and of regulated liberty to permit an individual to continue a business or occupation endangering the public health in order that he might derive profit from such occupation. We presume it will not be denied that under circumstances of peril and emergency the lawmaker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively for prevention as well as *pro re nata* for immediate effect. It is within his discretion when to exercise this power; and persons under license to pursue such occupations as may, in the public need and interest be affected by the exercise of the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power. The act of the General Assembly of twenty-sixth February, 1874, entitled "An act to regulate the private markets in the city of New Orleans and for other purposes," does not violate or infringe any vested right. It is not unconstitutional.

The defendant charges that the passage of the act was procured by bribery and corruption; that it was conceived in fraud, and its title designed to defraud. This is *coram non judice*. Courts will not be influenced by mere allegations of this kind, unsupported by any evidence whatever, to disregard the maxim "*omnia præsumuntur recte esse acta*."

It is objected that the law of February 26, 1874, is unconstitutional and void, as being in violation of article 114 of the State constitution, which directs that "every law shall express its object or objects in its title." We think the objection without weight. The act has but one object, that one object is expressed in its title. The title misleads nobody. The words "and for other purposes" are in the title to this act meaningless, for there is nothing else treated of in the act besides the regulation of private markets. Its purpose is *simplex dumtaxat et unum*.

The act of February, 1874, abolishes all private markets located within less than twelve squares of a public market. To that extent it repeals the act of 1866 under which the defendant sets up his rights. It is shown that he is keeping a private market within one square of the French market, one of the principal public markets of the city. He is doing so in violation of law. We think the judgment of the court *a qua* sustaining the defendant erroneous.

It is therefore ordered that the judgment of the district court be annulled, avoided and set aside. It is further ordered that the injunction prayed for by the plaintiff be granted and perpetuated enjoining and restraining the defendant from opening, conducting, carrying on or continuing any private market or place of business for the sale of fresh meats, fresh fish, poultry, game, vegetables, etc., in the city of New Orleans, within the space or distance of twelve squares of any public market under the jurisdiction and authority of the Administrator of Commerce of said city, and otherwise violating in any manner the provisions of an act entitled "An act to regulate the private markets in the city of New Orleans and for other purposes," passed by the General Assembly of the State of Louisiana on the twenty-sixth of January, 1874. It is further ordered that the plaintiff recover from the defendant one hundred dollars, and that the defendant pay costs in both courts.

WYLY, J., *dissenting*. Section 1 of act No. 134 of the acts of 1866 provides "that from and after the first day of January, 1867, it shall be lawful for all persons after they have obtained the license required for retailers of provisions to open and keep open at all proper hours of the day private markets, stores or stands, in any part of the city of New Orleans for the sale of meats, game, poultry, vegetables, fruit, and fresh fish, subject to the general sanitary ordinances of the City Council. In the record I find that the defendant, James Stafford, obtained State and city licenses as a wholesale merchant for the year ending thirty-first December, 1874. Under these licenses he has authority to sell at retail. He has all the "licenses required for retailers of provisions." Having the licenses required for retailers of provisions, James Stafford fully complied with the act of 1866, and his contract made in pursuance thereof is protected by the constitution of the United States, and it is in no manner impaired by the act No. 31 of acts of 1874, which was passed after said contract was made.

The plaintiffs, however, contend that three months before the defendant took out licenses as a wholesale merchant, entitling him to pursue the occupation of a retailer of provisions, the city passed an ordinance fixing the license for private markets at \$300; and not hav-

ing paid this license the defendant was not authorized to pursue the occupation of a keeper of a private market under his wholesale dealers licenses of one hundred dollars to the State and one hundred dollars to the city. To this a sufficient answer is, that the defendant having paid the licenses required for retailers of provisions, was entitled under the act of 1866 to keep a private market; and the city had no authority to pass the ordinance fixing the additional license or tax of \$300. As the State had the right to pass the law and fix the conditions upon which it would allow private markets, the city of New Orleans could not impose an additional condition without asserting the right to amend a law of the State. When the State says that all persons may keep private markets upon taking out the licenses required for retailers of provisions, the city of New Orleans has no right to defeat or restrict the will of the sovereign by passing an ordinance requiring an additional tax or license of \$300. The defendant paid the license required of retailers of provisions; he accepted the offer of the State contained in the act of 1866; and the contract was perfected by which he acquired the right to keep a private market at his store for the year 1874.

Assuming that act No. 31 of the acts of 1874, is constitutional, and that it repeals that part of the act of 1866, allowing private markets within twelve squares of a public market, in my opinion this law, passed after the defendant's rights were acquired, in no manner affected him. During the period fixed in the licenses, the defendant has the right to keep a private market. The State can not destroy this right without impairing the obligation of a contract. It is useless to talk of the exercise of police power by the State in the interest of public order and the health of the city. No one questions the right of the State to pass needful laws for the preservation of these important interests. No one has the right to pursue an occupation detrimental to the public health and safety. But the precise question is, is the statute No. 31 of the acts of 1874, a law passed in the interest of good order and public health? How can the public health and good order be endangered by allowing private markets within twelve squares of a public market? If private markets beyond twelve squares of a public market will not endanger public health and safety, how comes it that such markets within twelve squares will be detrimental? There is nothing in the act showing that the motive of the lawgiver was to preserve good order and the public health. It is an argument suggested by the ingenuity of counsel, and in my opinion it is entirely foreign to the issues presented in this case.

The title of the act is "An act to regulate the private markets of the city of New Orleans and for other purposes."

Section first makes it unlawful to keep a private market for the sale of fresh meats, poultry, fresh fish, etc., within twelve squares of a public market. Section second authorizes the Administrator of Commerce to close such markets opened or conducted in violation of section one. Section third imposes a penalty for violating section one.

Section fourth makes it the duty of the judge of the First District Court to charge the grand jury as to the provisions of this act.

Section fifth provides: "That upon the reverse side of each and every license granted by the State of Louisiana or the city of New Orleans for the carrying on, conduction, and operation of a private market for the sale of fresh meat, poultry, fresh fish, etc., the following words shall be printed thereon: "It is distinctly understood that the holder of this license shall not open, establish, or carry on a private market within twelve squares of any public market under penalty of the forfeiture of this license."

Section sixth provides that this act shall take effect from and after its passage, and that all laws in conflict therewith are repealed.

As before remarked, there is not one word in the statute showing that it is a police law for the preservation of good order and the public health. On the contrary, from the terms of the act the conclusion is inevitable that the lawgiver simply desired to amend the act of 1866, so as to prohibit private markets for the sale of fresh meats, fish, etc., within twelve squares of a public market. And this view is confirmed by considering the fifth section, which provides that hereafter a certain stipulation shall be printed on the reverse side of the licenses to carry on a private market. It imposes a new condition in the contract arising from the taking out of licenses under the act of 1866, whereby the person taking out said licenses stipulates not to keep a private market for the sale of fresh meats, fish, etc., within twelve squares of a public market. The law before us simply adds a new condition to the standing offer of the State under the law of 1866, to sell licenses or to make a contract with any one desiring it, to keep a private market.

How the modification of an offer to make a contract can modify or alter a contract already made, I can not imagine. There was no stipulation when the defendant got his licenses for the year 1874 that he would not keep a private market within twelve squares of a public market. A stipulation proposed in a law passed subsequent to the purchase of the licenses by the defendant, forms no part of the contract which arose by the purchase of said licenses. It is a stipulation which was not demanded by the State at the time, and which was not consented to by the parties. It therefore forms no part of the contract between the defendant and the State and is not obligatory on him.

Another reason why the statute was not passed to promote the public health is, that for that purpose this law was not necessary, the act of 1866 establishing private markets expressly stipulating that the right is granted, "subject to the general sanitary ordinances of the City Council." Besides, under the charter of 1870 the city has full authority to pass ordinances: "To regulate and preserve the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity." * * * After confiding the care of public health and good order to the city, the State had no occasion to pass the statute before us in the interest of good order and public health.

In the absence of a motive we can not presume the statute a police regulation.

But suppose the lawgiver had declared the act a police regulation, that would not make it such. Under the name of a police law the State can not deprive a citizen of his property or the right to pursue the occupation for which he has a license, when the enjoyment of such property or the pursuit of such occupation will not endanger public health, safety, peace and good order. The enjoyment of the occupation for which the defendant has State and city licenses for the year 1874, will in no manner endanger the public interests which the State can protect under the exercise of its police power. The police power, like all powers confided to the Legislature is not unlimited; and of the extent of this power it is for the courts and not the Legislature to decide. Any other doctrine would be subversive of liberty. The Legislature could call its laws police regulations, and thereby escape all the limitations of the constitution.

I agree with the district judge that the plaintiffs have no pecuniary interest in the controversy, the city having leased out the public markets for 1874. The enforcement of the law may benefit the lessees of the public markets, because it virtually gives them a monopoly or an exclusive right over all other persons to sell fresh meats, fish, poultry, and vegetables within twelve squares of the public markets. But whether the law is enforced or not against the defendant it can confer no pecuniary benefit on the plaintiffs. The jurisdiction of this court in civil cases is limited, and as the matter in dispute does not exceed five hundred dollars this court is without jurisdiction *ratione materie*, and the appeal should, on that account, be dismissed.

I come now to consider the constitutionality of the statute. Article 114 of the constitution requires that the object or objects of every law shall be expressed in its title. The sole object of the act is to amend the act of 1866, so as to prohibit private markets for the sale of fresh meats, game, poultry, fresh fish, and fruit within twelve squares of a public market, the intention being to give public markets the monopoly,

within such limits, of selling such produce or articles of merchandise. This, the undoubted object of the law, is not expressed in its title. The title "to regulate private markets" gives no clue to the purpose or object of the law. No one hearing the title of the act read would be apprised of the purpose to amend the act of 1866, so as to prohibit private markets for the sale of fresh meats, fish, poultry, and fruits within twelve squares of a public market. If this title be good to cover a prohibitory law within twelve squares, why would it not be equally as good to cover a law prohibiting private markets within one mile or twelve miles of a public market. To regulate suggests the idea of administering a thing, not of destroying it; the private markets we understand from the title are to be administered, all of them, in a certain way; but the title gives no clue to the destruction of any them. In my opinion the law is not covered by its title. It is repugnant to article 114 of the constitution and therefore void.

For the reasons stated I feel constrained to dissent in this case.

HOWELL, J., *dissenting*. In my opinion the defendant, Stafford, had complied with the law, by which he secured the right to carry on his business for one year, and that he could not be deprived of such right as is done in this case; and further, that the city of New Orleans having farmed out the public markets for the current year has no interest in the matter.

I express no opinion at this time upon the other questions involved in this proceeding.

Rehearing refused.

No. 5618.

CHARLES MCALISTER v. R. K. ANDERSON, Tax Collector.

The State when selling a certain piece of property for taxes of 1871, due thereon, did not sell it freed from the taxes of 1872. The State had a concurrent mortgage and privilege to secure the taxes due for both years, and the sale did not purport to release the taxes of 1872. The former owner might have redeemed his land by complying with the requirements of the law after the sale, but he could not have taken the property back freed from the taxes of 1872. The purchaser bought the property subject to the taxes of that year.

APPPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. Montgomery & Delony*, for plaintiff and appellant. *Leonard & Kennedy*, and *H. B. Steele*, District Attorney, for defendant and appellee.

LUDELING, C. J. In October, 1873, the plaintiff purchased, at a tax sale, a plantation in the parish of Carroll; he paid the price bid, being the full amount of the taxes and penalties due thereon for

the year 1871, and the costs of sale. In June, 1874, the same property was seized and advertised for sale for the taxes assessed on said property for 1872; and the purchaser enjoins the sale, on the grounds that the State sold the property to satisfy its lien or privilege on the property for the taxes of 1871, and sold it free from all incumbrances. The question for decision is, did the State sell the property freed from the taxes of 1872? We think not. The State had concurrent mortgages and privileges to secure the taxes due for both years, and the sale did not purport to release the taxes of 1872. The former owner might have redeemed his land by complying with the requirements of the law after the sale; but surely he would not have taken the property back freed from the taxes of 1872. The purchaser bought the property subject to the taxes of 1872.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

WYLY, J., *dissenting*. In October, 1873, the tax collector sold a plantation in the parish of Carroll known as the "Mounds Place," belonging to R. Tubman Keene, and Charles McAlister, plaintiff herein, became the purchaser for the price of \$1806 25, being the full amount of the taxes, penalties and costs due thereon for the year 1871.

Subsequently, to wit: in June, 1874, defendant seized and advertised said property for the taxes, penalties and costs due thereon for the year 1872; thereupon plaintiff brought this suit to enjoin the sale on the grounds stated in the petition, to wit:

First—The State having sold him the land for the taxes of 1871, which was the first lien, lost thereby the privilege for the taxes of 1872, which was next in rank.

Second—There has been no legal seizure and advertisement of the property.

The court dissolved the injunction with one hundred per cent. damages, and plaintiff appeals.

In October, 1873, when the tax collector sold the lands to McAlister for taxes, penalties and costs due thereon for the year 1871, the taxes of 1872 were due.

Under sections 66, 67, 68 of the act No. 42 of the acts of 1871, the lands in question had been forfeited to the State. And in *Morrison v. Larkin*, tax collector, 26 An. this court decided that under the revenue acts of 1871 and 1873, such lands could be sold by the tax collector for the total amount of taxes, penalties and costs due thereon to the State, reserving to the owner the right of redemption stated in section six of act 47 of the acts of 1873; and when the bid is for less than the total amount due the State for taxes, penalties and costs, the tax col-

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lector can not adjudicate the property, because in such case the law provides, "the bid shall be rejected." Section 9 of act 47 of the acts of 1873.

Considering sections 38, 55, 57, 59, 60, 69 of act 42 of the acts of 1871, together with the title of said act, there can be no doubt that the tax collector can collect taxes on the delinquent lists, and for this purpose he can sell lands forfeited to the State, provided the amount bid is sufficient to pay all the taxes, penalties and costs due to the State. Upon payment of such sum the owner could redeem the land, the title of which, by the filing and recording of the delinquent list in the Auditor's office, vested in the State; and it can not be presumed that the authors of the statute in question contemplated that a stranger should acquire from the tax collector a title to forfeited lands on terms more favorable than the former owner, who could only redeem by paying the State all of the taxes, penalties and costs due thereon. Nor can the statute be interpreted so as to authorize the tax collector to sell such property for less than the amount due the State, for this would involve the loss to the latter of a part of the revenues the tax collector was charged to collect. Without special authority the tax collector can not adjudicate forfeited lands for less than the total amount due the State thereon, and such authority is not to be found in the statutes before us. But this question, which has been settled, as I understand, in the cases of *Morrison v. Larkin*, 26 An. and *Garner, administrator, v. R. K. Anderson*, tax collector, lately decided, is not raised by the parties, although lying at the foundation of the action.

If McAlister has no title because the tax collector had no right, in October, 1873, to sell him lands forfeited to the State in December, 1871, for less than the total amount of the taxes and penalties due up to the time of the sale, he would have no interest to raise this litigation and to take out the injunction. But as the defendant has not questioned McAlister's title, or objected to his want of interest, this court will not raise the question, however pertinent to the case. Taking the question then as presented, did McAlister, who bought from the State forfeited lands in October, 1873, paying the price of adjudication, \$1806 25, the total amount of taxes and penalties for the year 1871, incur the additional obligation to pay the taxes of 1872, which accrued while the title of the property remained in his vendor, the State? I think not. The bid of McAlister was the *aggregatio mentium* between the buyer and the seller. McAlister paid the amount of his bid, and the State made the title to him. She is bound as warrantor to maintain the title she has conveyed to him; and she can not claim the rescission of the sale without previously tendering to McAlister the \$1806 25 which she received as the price of adjudication.

In regard to the obligations of a seller, the State, under our law, occupies no better position than any other vendor. She can not make a title to-day and destroy it to-morrow, on the pretext that while the title was in her, as from December, 1871, up to the sale in October, 1873, taxes had accrued in her own favor. McAlister certainly owed the State nothing on these lands at the time of the adjudication, but the amount of his bid, which he paid; and assuming the validity of the sale, this is what the State agreed to accept as the equivalent for the lands. Now if the court compels him to pay the additional sum of \$1200, the amount claimed for taxes accruing in 1872, while the State was the owner of the lands, it will virtually make a new contract for him, or compel him to perform a stipulation not mentioned in the sale. When the buyer paid the \$1806 25, the price of the adjudication, he discharged fully all his obligations resulting from his bid; and when the State accepted it and conveyed to him her title to the lands she incurred the legal obligations of every seller to maintain the vendee in the enjoyment of the thing which she gave as an equivalent for the price paid by him.

These propositions are elementary, and there is no escape from the conclusion to which they lead, assuming that the State was the owner of the lands at the time of the sale to McAlister. That forfeited lands belong to the State was expressly decided by this court in the case of *Morrison v. Larkin*, tax collector, 26 An., and the same doctrine was recognized and affirmed in the case of *Garner, administrator, v. R. K. Anderson*, tax collector, lately decided. Indeed this is declared by the law in precise terms. Section 68 of act 42 of the acts of 1871 provides: "That the said delinquent lists, or copies and verifications, when so filed in the office of the Auditor of Public Accounts, shall be entered by him in a record kept for that purpose, and shall vest from the day of filing a title to the lands and lots therein returned, in the State of Louisiana, which shall be impeachable only on proof that taxes for nonpayment whereof the lands were returned forfeited, had been in fact paid to the collector before the return of the lists to the recorder."

The right of redemption, however, was reserved to the owner by section 69. And by section 6 of act 47 of the acts of 1873, this right of redemption is reserved to the former owner for six months after the adjudication by the State of forfeited lands. The only reservation in the title which plaintiff received from the State, was the right of redemption reserved for six months in favor of R. Tubman Keene, the former owner of said lands, who seems to have neglected to exercise this right, and who sets up no claim to the property. In other respects the title is absolute and binds the State as warrantor.

My conclusion is, assuming the validity of the sale which is not questioned, the State can not destroy by selling the property for taxes of 1872, the title which she, as owner, made to the plaintiff in October, 1873, for the price of \$1806 25. She can not keep the price and take back the lands, or which is the same thing, convey them to another. The right of disposition belongs to the owner. She can not keep the price and at the same time exercise this main element of ownership over these lands. I therefore dissent in this case.

No. 5480.

STATE ex rel. JOHN L. MACAULAY v. CHARLES CLINTON, Auditor.*

A mandamus will not lie against the Auditor to make an estimate and fix the rate of the tax provided for by act 69 of the acts of 1870. As long as this duty was imposed by law upon the Auditor, he could by mandamus be compelled to perform it. But when by acts 3, 4 and 55 of the acts of 1874, the law imposing this duty was repealed, and it was made a penal offense for him to do any act obstructing the funding of the obligations of the State and the other provisions of said statutes, a mandamus can not be invoked.

The question whether the State by her legislation on the subject has impaired the obligations of her contract with the relator, is a matter that can not be decided in this controversy, because the State is not a party to the suit, and the Auditor has no interest in the solution of the question. The same remark is applicable to the other constitutional objections raised by the relator.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Kennard, Howe & Prentiss*, for relator and appellant. *H. C. Dibble*, acting Attorney General, for respondent and appellee.

WILY, J. The relator, the holder of certain bonds issued under act 15 of the acts of 1866, act 108 of the acts of 1868, and act 69 of the acts of 1870, sues out a mandamus to compel the Auditor to estimate and collect a tax sufficient to pay the interest on said bonds, pursuant to the fourth section of act 69 of the acts of 1870.

The court granted a rule *nisi*, and at the trial refused the mandamus. Thereupon the relator appeals.

The duty which the relator seeks to compel the respondent to perform was imposed by the fourth section of act 69 of the acts of 1870; but he refuses to comply with the demand on the ground that said section imposing said duty is repealed by acts 3, 4 and 55 of the acts of 1874.

Section four of act 69 of the acts of 1870 provides: "That the Auditor of Public Accounts shall, once in each year, estimate the amount of the annual interest on all the bonds issued under the provisions of this act, together with a sum equal to one-fortieth part of the bonds issued, and calculate as nearly as practicable what rate of tax on the total assessed real and personal property of the State will be required to produce the sums aforesaid; and he shall add the said rate to the tax already assessed for general purposes, and the tax so calcu-

lated and assessed shall be collected in currency, and paid into the treasury of the State at the same time and in the same manner as other general State taxes are required to be collected and paid, and the money so collected shall be credited on the books of the Auditor and Treasurer to a special fund, to be known and designated as the "Floating debt bonds fund," and the amount so credited, from year to year, is hereby annually appropriated for the payment of the interest and part of the principal of the bonds authorized by this act."

Here the State has made an annual appropriation and required the Auditor to make the calculation and fix the rate of a tax necessary to pay the interest on bonds authorized by said act. As long as this duty was imposed by law upon the Auditor, he could, by mandamus, be compelled to perform it. But when, by acts 3, 4, and 55 of the acts of 1874, the law imposing this duty upon the Auditor was repealed, and it was made a penal offense for him to do any act obstructing the funding of the obligations of the State and the other provisions of said statutes, a mandamus will not lie against the Auditor to make an estimate and fix the rate of the tax provided for in act 69 of the acts of 1870. The General Assembly which prescribed the duty in 1870 not only revoked the requirement in the legislation of 1874, but made its performance an offense punishable by fine and imprisonment.

The relator, however, contends that the provision of section four of act 69 of acts of 1870 was one of the stipulations in the contract by which the State issued, and he acquired the bonds, and the repeal thereof is repugnant to that provision of the constitution of the United States prohibiting a State from passing a law impairing the obligations of contracts.

We think the General Assembly had the right to repeal the law imposing the duty on the Auditor, which relator now seeks to compel him to perform; and as he is not now required by law to perform the duty, a mandamus will not lie against him.

As to the question whether the State by her legislation has impaired the obligations of her contracts with relator, we are of opinion that that matter can not be decided in this controversy, because the State is not a party to this suit, and the Auditor has no interest in the solution of the question. And the same remark is applicable to the other constitutional objections raised by the relator.

The only question pertinent to the case is: Is the duty required by the relator of the Auditor one of the ministerial duties of his office now prescribed by law? If it is not, as we think, a writ of mandamus should not issue against him. The same authority which prescribed the duty could and did revoke it, and made the performance a penal offense.

Judgment affirmed.

* Carried by writ of error to the Supreme Court of the United States.

State ex rel. Gourgotte v. Porte et al.

No. 5794.

STATE EX REL. PIERRE GOURGOTTE v. JEAN PORTE et al.

The relator had the right to take a suspensive appeal within ten days from certain orders of the judge *a quo* in relation to the sequestration of his property, and the release thereof on bond, and any attempt to execute the order before that time expired was unauthorized, and when the appeal was taken, the parties were left *in statu quo* before the order, and the effect of the prohibition issued by this court is to maintain the parties in the position they were in before the rendition of the order appealed from.

APPPLICATION for a writ of prohibition addressed to defendant Jean Porte and to Eugene Waggaman, sheriff of the parish of Orleans. *J. A. Bartlette*, for relator. *Murphy*, for Jean Porte, and *Ellis & Ellis*, for the sheriff, respondents.

LUDELING, C. J. Under a writ of sequestration, certain property was sequestered and taken out of the possession of Pierre Gourgotte, who released the property by bonding the same. Jean Porte, plaintiff in the sequestration suit, then took a rule against the sheriff to show cause why he should not be held responsible for the property, and to test the solvency of the bond given by defendant, Gourgotte. No notice was given to Gourgotte, the defendant. The bond was declared not good, and the plaintiff was permitted to bond the property. As soon as the defendant learned what had been done he tendered other sureties, although he says the first bond was good, and this was refused. He then obtained an order for a suspensive appeal from the aforesaid orders of the court, and gave bond according to law. But notwithstanding this suspensive appeal the parties persist in taking and withholding the property from him. He then obtained a writ of prohibition from this court. To this the sheriff answers that this court is without jurisdiction to issue said writ, because he is executing the orders of a court which had jurisdiction of the case.

When the suspensive appeal had been taken, the inferior court was without jurisdiction in the matter, and the appellate jurisdiction of this court attached; and it is in aid of our appellate jurisdiction that we grant the prohibition. This is too well settled to be questioned now. Nor is there any force in the position that he can not be prohibited from doing what he has already done, or from disturbing the possession of property of relator, when he has no such possession. The relator had the right to take a suspensive appeal within ten days from the said order, and any attempt to execute the order before that time expired was unauthorized, and when the appeal was taken the parties were left *in statu quo* before the order, and the effect of the prohibition is to maintain the parties in the positions they were before the rendition of the order appealed from.

It is therefore ordered that the prohibition be made peremptory and that defendants pay costs.

 Nicholson & Co. v. A. M. Jennings.

No. 4393.

NICHOLSON & Co. v. MRS. A. M. JENNINGS.

The pleas of want of citation and prescription are inconsistent. Pleading prescription is an appearance.

A PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Breaux & Fenner, O. P. Amacker*, for plaintiffs and appellees. *B. E. Forman*, for defendant and appellant.

MORGAN, J. In this court the defendant pleads defective citation and prescription. The pleas are inconsistent. Pleading prescription is an appearance.

The plea of prescription seems to be well founded, but as it was filed for the first time in this court, and the appellee requesting it, the case will be remanded for the purpose of allowing plaintiffs to prove an interruption.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the case be remanded to be proceeded in according to law, appellees to pay the costs.

 No. 4369.

B. ST. MESME LEBRETON v. P. J. KENNEDY.

The act by which the plaintiff suffered was not done by any one for whom the defendant is responsible, under his direction, or in the usual course of his employment. He can not therefore recover.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. J. Roman, Fellows & Mills*, for plaintiff and appellant. *R. King Outlar and Semmes*, for defendant and appellee.

MORGAN, J. The defendant owns a plantation which adjoins the property of the plaintiff.

While the defendant's laborers were employed in plowing in his fields, one of them, leaving the "cut," as it is called, where the plowing was being done, crossed over into another one and lit his pipe. After lighting his pipe he thrust the burning match into a pile of brush which had been gathered together for the purpose of facilitating the clearing of the land. There was a fierce wind blowing at the time in the direction of the plaintiff's property. The fire spread rapidly, and crossing over the defendant's line, reached the plaintiff's buildings and consumed them. Plaintiff sues to recover their value.

The act by which the plaintiff suffered was not done by any one for whom the defendant is responsible, under his direction, or in the usual course of his employment. He can not therefore recover.

Judgment affirmed.

No. 3899.

CANAL AND CLAIBORNE STREETS RAILROAD COMPANY v. SUCCESSION OF
JOHN ARMSTRONG.

This is a suit against the succession of John Armstrong, who is alleged to have been security on a bond given by one J. G. Campbell, as secretary and treasurer of the Canal and Claiborne Streets Railroad Company. As there is no sum fixed in the penal clause of the bond, the instrument contains no written promise on the part of Armstrong to pay any particular amount. Therefore his succession is not liable on the bond. As no amount is fixed in said bond, there is no evidence that the parties ever came to an agreement as to the extent of the obligation of Armstrong. The contract was incomplete.

Assuming that the signing and delivery of the instrument authorized or implied authority granted to the holder to fill in the amount—which this court does not admit—the death of Armstrong revoked the mandate and no sum has been filled in.

It has frequently been held that omissions in filling judicial bonds are supplied by the law.

But in the case at bar the bond is in no sense judicial. It is an ordinary conventional bond given by an officer of a corporation for the faithful performance of his duties, and as the surety promised to pay no specific sum, there is no obligation for this court to enforce.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. H. D. Ogden*, for plaintiff and appellee. *Finney & Miller and H. N. Ogden*, for defendant and appellant.

MORGAN, J. By the fifteenth article of the company's charter, the board of directors were authorized to appoint a secretary and other clerks, and to remove them at pleasure.

John G. Campbell was appointed secretary on the second of September, 1867. He gave bond, with John Armstrong and W. C. Falham as securities. The bond is as follows :

"Know all men by these presents, that we, J. G. Campbell, as principal, and John Armstrong and W. C. Falham, securities, are held and firmly bound *in solido* unto the Canal and Claiborne Streets Railroad Company, or assigns, _____, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators *in solido* firmly by these presents, and do hereby waive the benefit of division and discussion granted by law to sureties.

"Now, the condition of the above obligation is such, that whereas the above bounden J. G. Campbell has been chosen and appointed secretary and treasurer of the aforesaid Canal and Claiborne Streets Railroad Company, by reason whereof divers sums of money, goods and chattels and other things, the property of said corporation will come into his hands; if the said J. G. Campbell, his heirs, executors and administrators, at the expiration of his office, upon request to him or them made, shall make or give unto the said company, or their agent or attorney, a just and true account of all such sum or sums of money, goods, chattels and other things, as have come into his hands, charge or possession, as secretary and treasurer as aforesaid, and shall and do pay and deliver over to his successors in office or any other

person duly authorized to receive the same, all such balance or sums of money, goods and chattels or other things which shall appear to be in his hands and due by him to said company; and if the said J. G. Campbell shall well and truly, honestly and faithfully in all things, serve the said company as secretary and treasurer as aforesaid, during his continuance in office, then the above obligation to be void; else, to remain in full force and virtue."

On the eleventh of January, 1869, Campbell tendered his resignation to the company, which was received, but never accepted.

On the nineteenth of January, at a meeting of the board, Campbell was re-elected secretary, but at a reduced salary. Subsequent to his re-election there was a deficit in his accounts amounting to \$9809 65.

This suit is instituted against the succession of Armstrong, to make it liable for the amount of Campbell's deficit.

The defense is twofold: First, That no amount is stipulated in the bond. Second, That the defalcation occurred after Campbell's second election.

First—The object in stating an amount in a bond is to definitively fix the liability of the obligors and their sureties; but a man may bind himself in an indefinite amount if he chooses to do so, and this we think is what Armstrong did in this case. He bound himself that Campbell, at the expiration of his office, should give to the company a true account of all money, goods, chattels and other things as may have come into his hands, charge or possession as secretary and treasurer. As secretary, \$9809 65, belonging to the company, were not accounted for by him. His surety is responsible therefor.

Second—There was no time specified as to the duration of his term of office; neither was there a limit fixed to the time the bond was to last. Campbell's re-election by the board did not then change his position, or affect the obligation of his surety.

Judgment affirmed.

ON REHEARING.

WYLY, J. After further examination we have come to the conclusion that the succession of John Armstrong is not liable on the bond. As there is no sum fixed in the penal clause, the instrument contains his written promise to pay no particular amount.

"Suretyship can not be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract." Revised Code 3039.

It is manifest from the instrument that Armstrong, the surety, did not intend to bind himself for an unlimited amount. He certainly did not undertake to go security for all the money, goods and property of

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the Canal and Claiborne Streets Railroad Company that might come into the hands of Campbell, its secretary and treasurer. The writing contains no such promise.

As no amount is fixed in the bond, there is no evidence that the parties ever came to an agreement as to the extent of the obligation of Armstrong. The contract was incomplete. We can not now say that the succession of Armstrong owes the plaintiff \$9809 65, the amount of Campbell's defalcation; because when Armstrong signed the instrument there is no evidence that he and the plaintiff agreed that he, in such a contingency, should pay that sum.

Without making a contract for the parties, this court can not determine that the defendant owes the plaintiff anything. Assuming that the signing and delivery of the instrument authorized or implied authority granted to the holder to fill in the amount, which we do not admit, the death of Armstrong revoked the mandate, and no sum has been filled in.

The promise to pay the debt or discharge the obligation of another can only be proved by written evidence. Acts of 1858, page 148.

The obligation of Campbell extended to the full value of the money and property confided to him as secretary and treasurer of the Canal and Claiborne Streets Railroad Company. He was bound to account for all of it; and if he made way with it, an action would lie against him for the full value thereof. Armstrong, as we have stated, did not assume an obligation so extensive, because the instrument contains no such promise. To what extent then did he agree to be bound for Campbell's fidelity as an officer of the railroad company? No amount is fixed in the bond, and there is no written evidence that the parties came to an agreement on this important point. The instrument stands thus: In a certain contingency, namely, on the defalcation of Campbell, Armstrong was to pay, but what amount the parties failed to agree on. The contract of suretyship was not completed.

The case of *Pennyman v. Barramore*, 6 N. S. 494, cited by plaintiff, is not applicable. That was a sequestration bond, where the amount was not properly filled in; it was a judicial bond, and the surety signed in reference to the law fixing the amount and the conditions thereof. It has frequently been held that omissions in filling judicial bonds are supplied by law, but in the case at bar the bond is in no sense judicial; it is an ordinary conventional bond, given by an officer of a corporation for the faithful performance of his duties; and as the surety promised to pay no specific sum, there is no obligation for the court to enforce.

It is therefore ordered that our former judgment be set aside, and it is decreed that the judgment of the court *a quo* be annulled, and plaintiff's demand be rejected with costs of both courts.

No. 5015.

CITY OF NEW ORLEANS v. THE NEW ORLEANS MECHANICS' SOCIETY.

The property of the defendants is not exempted from taxation by their charter. There are no terms or expressions used in their acts of incorporation, declaring a contract between the State and the corporators, and the existence of such a contract can not be inferred, nor has the property been used for the specific purposes expressed in the acts of incorporation, and which was the condition of an exemption from taxation.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Merriek, Race & Foster*, for plaintiffs and appellants. *B. F. Jonas*, city attorney, *S. P. Blanc*, assistant city attorney, for defendants and appellees.

TALIAFERRO, J. Several suits were from time to time successively brought by the city against the defendant to enforce the payment of taxes. Judgments were obtained and executions issued on three of them. The defendant enjoined the proceedings, setting up that under its charter the society is exempted from the payment of taxes. Judgment was rendered perpetuating the injunction so far as it restrained the city from executing the writ of *fiery facias* issued in the case numbered 1155, and annulling the judgment rendered in that case. In the other cases the injunction was dissolved. At the same time judgment was rendered in favor of the city in two other suits founded on the same cause of action, and cumulated by consent with the injunction cases.

From this judgment, so far as it is against the Mechanics' Society, the defendant appeals.

The New Orleans Mechanics' Society was incorporated in the year 1821. The third section of the act of incorporation provides: "That it shall not be lawful for this incorporation to apply their revenues to any other than charitable purposes and the promotion and improvement of mechanical arts. This law shall be in force for and during the term of twenty years." By an act approved March 21, 1850, the State transferred to the society the possession and occupancy forever of a certain portion of ground on the square bounded by Canal, Baronne, Common and Philippa streets. The society was required to build upon the ground granted to it a brick or stone building, suitable for a library, lecture room, and cabinet of natural history and mechanical inventions, and to establish and maintain a library for the use of the mechanics of New Orleans, and an annual course of lectures on the physical sciences, and particularly those connected with agriculture and the mechanical arts. The society caused to be erected on the lot of ground so granted the building called "The Mechanics' Institute."

The society acquired in 1853 from the city of New Orleans the lot of ground, and buildings upon it, which had been donated to the city by Abijah Fisk, for the establishment of a free library, known for many

years as "The Fisk Free Library." This property, situated at the corner of Bourbon and Customhouse streets, was transferred to the Mechanics' Society, under the same conditions, and to be held and used for the same uses and trusts under which it was held by the city. The society was bound by this transfer to place the Fisk Free Library in the building known as the Mechanics' Institute, and was authorized to rent the building in which the library was first established, the income from rent to be applied to the enlargement and maintenance of the library, etc.

The city asserts the right to levy and collect taxes on these properties. It may be here noted that the suit numbered 1155 referred to in the judgment of the lower court, and in relation to which the injunction was perpetuated, was brought for the taxes imposed upon the lot of ground, and buildings upon it, donated originally by Abijah Fisk for the Fisk Free Library; and that the other suits in which judgments were rendered in favor of the city were for taxes on the property known as the Mechanics' Institute.

The defendant contends that the property held by the corporation is exempt from taxation by contract between the city and the corporation; such exemption being implied, if not expressed, by the act of incorporation; that no other construction can be given to the charter and subsequent acts of the Legislature than that it was the understanding and intent of the law maker and the party accepting the terms and conditions of the laws, that the properties of the society should forever be free from all taxation; that this construction has been given to it by both State and city for near half a century; that the rights acquired by the society, and which it has so long enjoyed, are of a vested character and can not be affected by subsequent changes in constitutions or laws.

On the part of the city it is held that exemptions are never implied, and all laws granting exemptions from taxation are to be most strictly construed. It is conceded that as a charitable society the property of the Mechanics' Society, actually used by *itself* for purposes of charity, would be exempt under the general laws of the State and the charters of the city, but that such an exemption is not in the nature of contract, and it can be recalled at any time; that the words of the law show it to be but a conditional exemption, and in order to claim it the society must use its buildings, the Mechanics' Institute, for its purposes of charity; the moment they fail to occupy it to that end it ceases to be exempt; that by law the right subsists so long as actually used for charitable purposes. The plaintiff denies that the building of the defendant, called the Mechanics' Institute, has been used as required by law for charitable purposes. The evidence sustains this

position taken by the plaintiff. It is shown that during the years for which the city is claiming taxes against the property of this corporation, the building called the Mechanics' Institute was leased out and not used for the purposes intended by the act of March 21, 1850. It is not shown to have been at any time appropriated to the objects of the said act. The Fisk Free Library, a witness states, is kept open regularly every day in the Mechanics' Institute, and that the revenues arising from that property are all applied to educational and charitable purposes; and that the rents derived from the other property at the corner of Bourbon and Customhouse streets, are all appropriated to the expenses of Fisk Free Library, and to no other purpose.

We think the property of the defendant, not being used for the specific purpose expressed in the acts of incorporation, is not exempted from taxation. We find no terms or expressions used in these acts declaring a contract between the State and the corporations, and we can not infer the existence of such a contract. The property of defendants is not exempted by their charter. We think there was error in the court below in rendering judgment in favor of defendants, annulling the judgment in suit No. 1155, and maintaining the injunction as to the execution of that judgment; and in other respects that the decree is correct.

It is therefore ordered that the judgment of the district court, so far as it maintains the injunction restraining the execution of the plaintiffs' judgment against the defendant in suit No. 1155 and annuls that judgment, be avoided, annulled and set aside. It is further ordered that the injunction be dissolved as to the said judgment in suit No. 1155; and it is finally ordered that the decree of the lower court as thus altered and amended be affirmed, with costs in both courts.

No. 4412.

J. DENNY v. H. SIMONS.

There was a total failure on the part of defendant to deliver at Havana, island of Cuba, certain articles contracted for. The interference of the military power of the government at the time has relieved him from the stipulated penalty in case of failure, but he must return the portion of the price received by him for the articles not delivered.

APPEAL from the Fifth District Court, parish of Orleans. *Leamont, J. Fellows & Mills*, for plaintiff and appellant. *D. C. Labatt*, for defendant and appellee.

HOWELL, J. Plaintiff sues for \$30,000 paid by him on a written contract for the delivery to him, in Havana, of two hundred ox wagons, two hundred and fifty yokes and bows, thirteen hundred rings and staples, and twenty-five hundred iron keys, and the further sum of

Denny v. Simons.

\$10,000, as the stipulated penalty for the failure of the defendant to perform his part of the contract. The answer is a general denial. There was judgment of nonsuit, and the plaintiff appealed.

The defendant bound himself on the thirtieth January, 1865, to ship the above articles on or before the twenty-fifth of February following, and received three payments on the price amounting to \$30,000, according to the stipulations of the contract. On the twenty-fifth of February, only fifteen of the wagons had been shipped, but with directions to the consignees to hold them subject to the order of the shipper. Fifty more of the wagons were subsequently put on board of a vessel, and the military authorities seized and detained them for some time. The cause of this seizure is not shown by competent evidence; that offered being hearsay was properly objected to by plaintiff; but he states in his testimony the fact of the seizure, and there is evidence that these wagons were subsequently in the yard of the defendant. The plaintiff was in Havana for the purpose of receiving the wagons, and several times applied to the agents or consignees for them without effect. There was a total failure on the part of the defendant to deliver these articles; but we think the interference of the military power of the government at the time relieved him from the stipulated penalty, but he must return the portion of the price received by him.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of defendant the sum of thirty thousand dollars, with five per cent. interest from twenty-fifth February, 1865, and costs.

No. 5323.

THE STATE ex rel. J. C. SEALE v. ISAAC H. CRAWFORD.

The judgment of the court in this case is based entirely on the one already rendered in the case of Claiborne v. Parlange, the facts being substantially the same. 26 An. 548.

APPPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. H. R. Steele*, District Attorney, for relator and appellee. *Isaac H. Crawford*, appellant, *in propria persona*.

LUDELING, C. J. The facts in this case are substantially the same as the facts in the case of the State ex rel. L. B. Claiborne v. Charles Parlange, decided by this court in May, 1874.

For the reasons stated in that case there must be judgment in favor of the plaintiff.

It is therefore ordered that the judgment of the lower court be avoided and annulled, and that there be judgment in favor of J. C. Seale, recognizing him as the district attorney *pro tempore* of the parish of Madison, and for costs of both courts against the defendant.

WYLY, J., *concurring*. In the decree in this proceeding, under the intrusion act for the office of district attorney *pro tem.*, the court finding that section one of act No. 44 of the acts of 1874 abolished the office, and finding that sections two, three and four of said act, reviving the said office and authorizing the Governor to fill vacancies therein by appointments, are void, because repugnant to article 114 of the constitution, rejected the demand of the plaintiff, and decided that neither the relator nor the defendant was entitled to the office in dispute, because by the statute referred to the office was abolished.

The title of the act is: "An act to repeal sections 1178, 1179, 2760, 2761 of Ray's Revised Statutes and for other purposes." These sections of the Revised Statutes, referred to in the title, are the ones creating the office of district attorney *pro tem.*

Section one repeals those sections, thereby abolishing the office.

Sections two, three and four of said act revive or reinstate the office of district attorney *pro tem.*, and authorize the Governor to fill vacancies therein by appointments.

Vacancies were, by the previous law, filled by the police jury or by the parish judge.

The result, therefore, intended to be accomplished by the enactment of the statute under review was simply to change the manner of filling vacancies in the office of district attorney *pro tem.*

The General Assembly never intended to abolish the office, as the provision of section one, disconnected from the succeeding sections, would seem to imply.

It is the intention of the lawgiver which the court must seek out, and, if possible, give effect to in interpreting a statute; and the whole act must be construed together in order to determine the intention of its authors.

It results, therefore, from the foregoing observations, that the enactment in question is merely a statute to change the manner of filling vacancies in the office of district attorney *pro tem.* This obviously was the intention, meaning and purpose of the law.

Now, the question is: Is this object covered by the title, as required by article 114 of the constitution? Manifestly it is not. It is urged, however, that the title covers the first section, abolishing the office, and that this part of the statute is valid. This would be to make a law which the General Assembly never intended to enact, because, as before stated, considering all the sections together, it is evident the purpose was to continue the office; but the manner of filling vacancies therein was intended to be changed. This was the evil to be remedied.

In Cooley's Constitutional Limitations, second edition, page 147, section 5, the author, in discussing the question: What is the effect

where the act is broader than the title, says: "But if the act is broader than the title, it may happen that one part of it can stand, because indicated by the title, while as to the object not indicated by the title it must fail. Some of the State constitutions have declared that this shall be the rule; but the declaration was unnecessary, as the general rule, that so much of an act as is not in conflict with the constitution must be sustained, would have required the same declaration from the courts. If, by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional." On page 178 the same learned author says: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it can not be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and the bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the Legislature intended them as a whole; and if all could not be carried into effect, the Legislature would not pass the residue independently; then if some parts are unconstitutional, all of the provisions which are thus dependent, conditional or connected, must fall with them."

Taking the statute altogether, it is impossible to suppose the legislative intention was to abolish the office in question, because this would render meaningless sections two, three and four of said act reviving

the office, providing the manner of filling vacancies and designating the salary appertaining thereto. By striking out these sections because not covered by the title, and allowing the first section to stand alone, the court will, in effect, make a law defeating the obvious purpose of the General Assembly; it will abolish an office that was not intended to be abolished. This can not be done. None of the sections of the statute can stand, because when disconnected, they do not indicate the legislative will, and as connected, they are not covered by the title.

My conclusion is the statute is unconstitutional, and the title set up by the defendant thereunder is void.

I therefore concur in the decree of this court in this case.

No. 3539.

DOMINICK KOEIMEL v. NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

The plaintiff claims damages from the defendants on the ground that they have located their railroad so near his dwelling as virtually to destroy its usefulness to him for the purpose for which it was built.

It is a valid defense that defendants were authorized by the Legislature and the City Council to place their track where they did.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lons, J.* Jury trial. *Lyman Hardin*, for plaintiff and appellee. *John A. Campbell*, for defendants and appellants.

MORGAN, J. The defendants, in curving their track, cut off a portion of the banquette in front of plaintiff's property. He avers that the building of the railroad in such close proximity to the front of his house and door and the frequent passage of the train thereon have rendered his dwelling extremely uncomfortable and unsafe and dangerous to his wife and children, and that his house is liable to be set on fire on the passage of every train. For this he seeks damages, and a jury awarded him eight hundred dollars.

The answer to his demand is that the defendants were authorized by the Legislature and the City Council to place their track where they did.

This makes it unnecessary to consider the bills of exceptions found in the record.

It is therefore ordered that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

Koelmei v. New Orleans, Mobile and Chattanooga Railroad Company.

WILY J., *dissenting*. Under act No. 28 of the acts of 1868, the defendants obtained the grant of the right of way along Elysian Fields street and certain other streets of New Orleans, provided said company shall not unnecessarily impair the usefulness and convenience to the public of such streets as its railroad may pass upon.

The grant of the right of way in general terms along the street of a city does not, in my opinion, authorize a railroad company to construct its road on the banquette, devoted to the exclusive use of foot passengers and to the special service due the adjoining property. I do not find from the evidence that the location made by defendants of the road was authorized by law. In my opinion, they had no authority from the State to build their road on the sidewalk on Elysian Fields street, and so near the dwelling house of plaintiff as virtually to destroy its usefulness to him for the purpose for which it was built. In principle there is no difference between destroying the house and destroying its usefulness to the owner.

The plaintiff recovered judgment on the verdict of a jury for eight hundred dollars, which was nearly the value of the property, and I think that judgment should not be disturbed. I therefore dissent.

No. 5742.

TEMPLE S. COONS v. JOSEPH F. KENDALL.

It was improper for a tutor to use a mortgage note issued for a specific purpose on the minor's behalf, as collateral security of an individual debt of his own, unconnected with said minor's interest. The plaintiff was aware of these circumstances and therefore can not recover.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. J. Caldwell Peirce*, for plaintiff and appellant. *E. Shackelford*, for defendant and appellee.

HOWELL, J. Plaintiff sues on a note for \$2500, made and indorsed by P. F. Kendall, tutor of the defendant, and asks to enforce a mortgage with which it is identified, on the allegation that the said note and mortgage were executed in conformity with an order of the probate court homologating the proceedings of a family meeting which advised and authorized the same. The defense is, that the said note and mortgage were executed, to the knowledge of plaintiff, for the specific purpose of putting improvements on property belonging to said minor, but was given to plaintiff as collateral security for an individual debt of the tutor, for the sum of \$700, evidenced by a note of said tutor, and that the minor can not be held responsible therefor.

 Coons v. Kendall.

There is a prayer for a judgment in favor of defendant and the surrender of the note.

The evidence sustains this defense, and hence the judgment in favor of the defendant is correct. It was an improper use of the note by the tutor, and from the allegations of plaintiff's petition, he was aware of the purpose of the note and mortgage, while it is shown that the note for \$700, upon which this note was a collateral, was unconnected with the minor's interest, and an individual transaction of the tutor, who had no authority for so using the said mortgage note.

Judgment affirmed.

 No. 4101.

SAMUEL CHOPPIN v. JAMES WILSON et al.

Where the certificate of the clerk is in the usual and proper form, if the appellant has not seen to having a proper record placed before this court and the evidence has not come up upon which he expects to get a judgment, he must take the consequence. If the evidence is necessary to plaintiff, he should have suggested a diminution of the record and called for a *certiorari*.

The plaintiff in execution against a defendant who is a member of a partnership, has the undoubted right to seize and to sell under his writ the interest of the owing partner in the partnership property. But his rights stop there. His execution neither dissolves the partnership, nor authorizes the appointment of a receiver with power to liquidate the partnership affairs.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. B. R. Forman*, for plaintiff and appellee. *Bentinck Egan*, for defendants and appellants.

ON MOTION TO DISMISS.

MORGAN, J. Plaintiff moves to dismiss this appeal because the testimony of two material witnesses heard on the trial, and a certain document offered in evidence is not in the record.

The certificate of the clerk is in the usual and proper form.

If the appellant has not seen to having a proper record placed before us and the evidence has not come up upon which he expects to get a judgment, he must take the consequences. If the evidence is necessary to the plaintiff, he should have suggested a diminution of the record and asked for a *certiorari*.

The motion to dismiss is denied.

ON THE MERITS.

MORGAN, J. Plaintiff obtained judgment against the defendant for \$175. Upon this judgment he issued execution and caused the sheriff to seize the assets of the firm of J. S. Simonds & Co., of which firm the defendant was a partner. Alleging, in a supplemental petition, that by

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this seizure the firm of Simonds & Co. was dissolved, and that a liquidation and settlement thereof was necessary in order to ascertain the share coming to the defendant, he prayed that the firm be ordered to show cause why a receiver should not be appointed to liquidate the affairs of the firm, to the end that out of what remained from the liquidation, his demand might be paid.

Before the rule was disposed of, J. S. Simonds died. His administratrix was made a party thereto. The rule was made absolute. The administratrix appealed.

We do not understand that the seizure under execution of the interest of a defendant in partnership property, operates a dissolution of the partnership, and we understand that a receiver will only be appointed to a partnership after its dissolution, or at the instance of a partner where the acts of his copartner are of such a character as would justify him in asking for a dissolution of the partnership.

The plaintiff in execution against a defendant who is a member of a partnership has the undoubted right to seize and to sell under his writ the interest of the owing partner in the partnership property. But his rights stop there. His execution neither dissolves the partnership, nor does it authorize the appointment of a receiver with power to liquidate the partnership affairs.

The only question before us is whether, in the case stated, the court is authorized to appoint a receiver. We think not.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the rule for the appointment of a receiver be dismissed, plaintiffs to pay costs.

Rehearing refused.

 No. 4512.

FELIX FORMENTO v. FRANCIS JOSEPH ROBERT.

Until the error in the judgment condemning Joseph N. Robert instead of François J. Robert was corrected, execution could not issue against the said François J. Robert, because he was not condemned in the decree, and as the case was pending for revision in this court, the judge *a quo* was without jurisdiction and could not change the decree.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. A. & W. Voorhies*, for plaintiff and appellant. *G. Schmidt, Dalton & Walker*, for defendant and appellee.

WYLY, J. Plaintiff took a rule on the defendant to show cause why execution should not issue against him notwithstanding the appeal taken by him, on the grounds that the bond was not sufficient for a

Formento v. Robert.

suspensive appeal, and the surety was not good and sufficient. The rule was made absolute and execution issued.

The defendant then moved to set aside this order, because there was no judgment against him, the decree condemning Joseph N. Robert.

This motion was sustained, and the order for the execution of the judgment was annulled and the writ quashed.

Thereupon plaintiff took this appeal.

We think the court did not err. Until the error in the judgment condemning Joseph N. Robert instead of François J. Robert was corrected, execution could not issue against the said François J. Robert, because he was not condemned in the decree; and as the case was pending for revision in this court, the judge *a quo* was without jurisdiction and could not change the decree.

Judgment affirmed.

No. 5726.

LOUISIANA NATIONAL BANK v. CITY OF NEW ORLEANS et als.

The plaintiff, as a creditor and a taxpayer has no right to interfere in the administration of the municipal corporation of New Orleans, or to invoke the aid of the court to compel the city to collect license in money and not in Metropolitan Police warrants as required by law. He has no direct pecuniary interest in the question raised. Hence, on this ground, the intervenors, holders of said warrants, who are the real parties whose rights are at issue, can object to this litigation and to the application of plaintiff for an injunction against the city. They have good cause to oppose the issuance of a proceeding prejudicial to them, at the instance of a party without interest to demand it. As the interests of the city were not affected, she set up no serious defense, and it looks as if the judgment as to her was a mere consent judgment. The real controversy was with the intervenors.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Finney & Miller*, for plaintiff and appellee. *B. F. Jonas*, city attorney, for defendant and appellee. *J. W. Thomas* and *A. O. Lewis*, for intervenors and appellants.

WYLY, J. The plaintiff a creditor and taxpayer, enjoins the city of New Orleans from receiving in payment of licenses Metropolitan police warrants.

The city makes no serious defense. But John Klein and Thomas Talis, Jr., who are holders of many of these warrants have intervened, alleging that these warrants are receivable for licenses under act No. 33 of the acts of 1874; that they were also receivable for licenses under act 44 of the acts of 1869 in force at the time they were issued; that on the face of these warrants it is stipulated that they are receivable for all licenses, taxes and debts due or to become due to the parishes of Orleans, Jefferson and St. Bernard, and the cities of New Orleans and Carrollton up to the amount of the apportionment assessed by

the Metropolitan Police Commissioners against said parishes or cities respectively for the fiscal year in which they were issued ; and that the value of said warrants will be impaired if the city is enjoined from receiving them for licenses as required by law, and that intervenors will consequently be injured. The court perpetuated the injunction, and dismissed the intervention ; the city acquiesced in the judgment, but the intervenors have appealed.

As the interests of the city were not affected, she set up no serious defense, and we are inclined to regard the judgment as to her a mere consent judgment. The real controversy was with the intervenors. They object ; first, that plaintiff as a creditor and a taxpayer, has no right to interfere in the administration of the municipal corporation of New Orleans or to invoke the aid of the court to compel the city to collect license in money and not Metropolitan police warrants as required by law. The plaintiff has no more right to the writ which it seeks than any other creditor and taxpayer, and we apprehend the law could not be administered if every person, occupying the same position, could rush into court for an injunction, by which he could exercise a supervisory control over the administration of government in the city of New Orleans.

As to plaintiff, the questions raised in the petition and in the argument are purely speculative ; they apply to matters not under plaintiff's administration, and in which it has not a direct pecuniary interest.

As the intervenors are the real parties whose rights are at issue, we think they can object to this litigation and to the application of plaintiff for an injunction, on the ground that plaintiff has no interest in the matter complained of, and has no right to raise a controversy in which only the city of New Orleans and the holders of the Metropolitan police warrants are concerned. They can object to the issuance of an injunction prejudicial to them at the instance of a party who is without interest to demand it. It is the business of courts to adjust the rights of litigants and settle issues which they have an interest in presenting.

An injunction should not be issued on the petition of a party wholly without interest, to restrain a municipal corporation from performing its duties, and if the corporation acquiesces, as in this case, the parties interested in the performance of the duty sought to be restrained can raise the objection of the want of interest in the applicant to obtain the restraining order.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that the injunction be disallowed and plaintiff's petition be dismissed with costs of both courts.

No. 4102.

L. A. WELTON v. R. P. BURTON, Captain, AND THE OWNERS OF STEAM-
BOAT RUTH.

The plaintiff had no privilege on the boat, as he claims, because the \$500 advanced by him were to cover the expenses which he undertook to defray. The sequestration was therefore wrongfully issued.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. S. R. & C. L. Walker*, for plaintiff and appellee. *Bentinck Egan*, for defendants and appellants.

LUDELING, C. J. The plaintiff alleges that he loaned the defendant \$500, to enable the boat to make a trip up Red river, in which he says he guaranteed a profit of \$450. He claims that there was a profit of \$300 on the trip. He alleges that he had a privilege on the boat for the money loaned, and he obtained a writ of sequestration against the boat, etc. He further prayed for damages and attorney's fees.

The defendant moved to dissolve the sequestration, which was refused. He then answered, and during the course of the trial offered to pay the plaintiff \$297 45 with five per cent. from twenty-eighth December to thirtieth March, 1872. This was intended as a real tender, but it was made only in the presence of one witness. C. P. article 407. There was judgment for the five hundred dollars, with privilege on the boat, etc. Defendant has appealed.

The evidence shows that the plaintiff chartered the boat for one trip up Red river for \$450; that before starting, the captain and owner required the plaintiff to advance \$500 for the expenses of the boat, which was done. The trip was made for the benefit of the plaintiff, and at his risk and expense. His obligation was to defray all expenses, and pay besides \$450, the price of the charter, and he was to reap the gains or profits of the trip. The evidence shows that the profits were \$247 45. The \$500 advanced exceeds the price of the charter of the boat by \$50, which with the profits must be paid to the plaintiff, with legal interest from judicial demand. The plaintiff had no privilege on the boat, as the \$500 advanced by him were to cover expenses which he undertook to defray; the sequestration was, therefore, wrongfully issued.

It is therefore ordered that the judgment of the lower court be set aside, and that there be a judgment in favor of the plaintiff against the defendant for two hundred and ninety-seven dollars and forty-five cents, with five per cent. interest per annum from judicial demand, and all costs of the lower court, except those incurred by the sequestration, which must be paid by the plaintiff. The costs of appeal to be paid by the plaintiff.

D. & J. D. Edwards v. Fairbanks & Gilman. Cavaroc & Son v. D. & J. D. Edwards.

No. 5423.

D. & J. D. EDWARDS v. FAIRBANKS & GILMAN. CHARLES CAVAROC
& SON v. D. & J. D. EDWARDS.

Admitting that the New Orleans Mutual Insurance Association had no right to purchase the property in controversy from Fairbanks & Gilman, it does not make said property liable to Fairbanks & Gilman's creditors in payment of their debts. If the company did any thing contrary to law, the result might be the failure of its charter, but this court does not understand the law to be that if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized by his creditors to pay his debts.

The sale of the machinery (the property in question) was a valid sale. Fairbanks & Gilman remained in possession it is true, but they held by a precarious title, to wit, a lease from the purchasers, and could have been divested of possession at any time, if the conditions of the lease had not been complied with.

The machinery thus sold to the New Orleans Mutual Insurance Company was paid for by Fairbanks & Gilman either at the time the sale was made or before this suit was instituted. This would, of course, destroy whatever privilege the Edwards, plaintiffs, had as vendors. But all the machinery and materials which were not mentioned in the act of sale to the said insurance company and all the machinery and materials put into the building by D. & J. D. Edwards since that sale are liable to their execution. Whether or not the company have the landlord's lien on these effects can not now be settled. If they have, when the property is sold, they can exercise it.

The intervention of Cavaroc & Son must be maintained as to the sugar and molasses seized. These articles had been furnished to be refined for a compensation to Fairbanks & Gilman of two-thirds of the profits Cavaroc & Son might make. These relations between Cavaroc & Son and Fairbanks & Gilman were not those of partners, each liable for the acts of the other. No part of the property seized ever belonged to Fairbanks & Gilman. What they were to receive from Cavaroc & Son was, in reality, only a stipulated price for work which they agreed to perform. Whether Cavaroc & Son owed any thing to Fairbanks & Gilman or not on account of their transactions, is another matter. But this question can not be decided in the present controversy.

APPPEAL from the Fifth District Court, parish of Orleans. *Oyllum, J. Hornor & Benedict*, for D. & J. D. Edwards, plaintiffs and appellants. *Randolph, Singleton & Browne*, for the New Orleans Mutual Insurance Association, intervenor and appellant. *J. S. Whitaker*, for Fairbanks & Gilman, defendants and appellees. *F. Fuselier*, for Cavaroc & Son, intervenors and appellees. *E. T. Merrick, Race & Foster*, for Oliver Pierce, intervenor.

MORGAN, J. D. & J. D. Edwards obtained judgment against Fairbanks & Gilman for \$17,609 45 for machinery furnished and work and labor performed in a refinery which is alleged to belong to the defendants.

Under execution the machinery was seized. Subsequently, certain sugars and molasses found in the refinery, and which had been refined there, were also seized.

The New Orleans Mutual Insurance Company claim that the machinery seized belongs to them. Cavaroc & Son aver that the sugars and molasses seized are their property. The insurance company claims the property under a notarial act, dated November 8, 1872, in which it is declared by Fairbanks & Gilman that they had sold certain

D. & J. D. Edwards v. Fairbanks & Gilman. Cavaroc & Son v. D. & J. D. Edwards.

machinery, etc., which is detailed in the act, to the company for \$25,000, reserving to themselves the right of redemption within three years on the repayment of the like sum.

By the same act the machinery, etc., was to remain in the possession of Fairbanks & Gilman; the building in which it was located was rented to them for several years upon their paying a monthly rent therefor. To which the plaintiffs answer that, as an insurance company, the laws of Louisiana will not permit them to enter into any such contract as that now set up, and that the contract now insisted upon being in direct violation of their charter, as well as the law, can not be enforced against any third person not party or privy to it, who has rights independent of it, and growing out of it. It may be admitted that the company had no right to purchase the property in question from Fairbanks and Gilman. Does that make the property liable to Fairbanks & Gilman's creditors in payment of their debts? We think not. If the company did any thing contrary to law, the result might be a forfeiture of its charter. But we do not understand the law to be that if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized by his creditors to pay his debts. Admitting that the purchase by the company transferred the title, the formalities of the law with regard to its tradition having been complied with, the next question in this case is whether the requisites of the law were complied with; that is to say, the objects sold being machinery, were they movables? If movables, was delivery necessary to complete the title to them? Was there a delivery? The buildings in which Fairbanks & Gilman's machinery was contained belongs to Del Bondio; Del Bondio leased to Willoz; Willoz transferred his lease to Fairbanks & Gilman.

On the eighth November, 1872, Fairbanks & Gilman sold all their interest in certain machinery contained in that building to the New Orleans Mutual Insurance Company, who acknowledged possession of the same for \$25,000. To the sale was attached the power of redemption, and it was stipulated that in case Fairbanks & Gilman paid back to the insurance company the amount received by it within three years, there was to be a retrocession of the property sold. By the same act Fairbanks & Gilman transferred to the insurance company their lease of the property. And by the same instrument the insurance company leased the building and the machinery therein contained to Fairbanks & Gilman, who were allowed to make such alterations upon the buildings and improvements, and to add thereto such new machinery and apparatus as might better adapt them for the purposes for which they were intended.

D. & J. D. Edwards v. Fairbanks & Gilman. Cavaroc & Son v. D. & J. D. Edwards.

The sale of the machinery was, we think, a valid sale. Fairbanks & Gilman remained in possession, it is true, but they held by a precarious title, to wit, a lease, and could have been divested of possession at any time if the conditions of the lease had not been complied with. We think, therefore, that the machinery mentioned in the act of sale of the eighth November, 1872, was not liable to be seized under execution to pay Fairbanks & Gilman's debt. We also think that the machinery thus sold was paid for by Fairbanks & Gilman either at the time the sale was made or before this suit was instituted. This would, of course, destroy whatever privilege the Edwardses had as vendors.

But the record shows from the testimony of witnesses on the part of the intervenors, that besides the machinery, etc., covered by the act of sale, there were other articles belonging to Fairbanks & Gilman, worth some \$30,000. The insurance company, however, says that if this be the fact, the instant Fairbanks & Gilman acquired the same as owners, the title of the company *eo instanti* attached, and it became the owner thereof, and the possession of Gilman & Fairbanks was the possession of the company.

The result of this doctrine, if correct, would be that if a man leases a building and that which the building contains at the time of the lease, everything which the lessee puts into the building would become the property of the lessor. We find no authority upon which such a conclusion could rest.

It does not, therefore, in our opinion, matter whether the goods furnished by D. & J. D. Edwards, after the sale from Fairbanks & Gilman to the insurance company, were paid for or not. There is no doubt in our mind that the debt claimed by the Edwardses is due, and whether due or not is no concernment to the company. They have the right to protect their own property from illegal seizure, but they have no authority to prevent a creditor from making his debt out of the property of his debtor.

The only question before us is whether the property sold to Fairbanks & Gilman, after their sale to the insurance company, belongs to Fairbanks & Gilman, or whether it belongs to the insurance company, who never bought or paid for it. It seems to us that the question answers itself. The authorities cited, 5 An. 532; 12 La. 170; 9 La. 99; 5 N. S. 247; 16 La. 94, do not, in our opinion touch the question at issue here.

We conclude, therefore, that all the machinery and materials, which was not mentioned in the act of sale of the eighth of November, 1872, and all the machinery and materials put into the building by D. & J. D. Edwards, since that period, are liable to their execution.

Whether or no the company have the landlord's lien on these effects can not now be settled. If they have, when the property is sold, they can exercise it.

As regards the intervention of Cavaroc & Son, it must, we think, be maintained.

Cavaroc & Son were commercial copartners. Fairbanks & Gilman were sugar refiners.

Cavaroc & Son agreed to furnish raw sugars and molasses, which Fairbanks & Gilman agreed to refine. The compensation they were to receive for this work was two-thirds of whatever profit Cavaroc & Son might make out of the sugars and molasses. At the time of the seizure a quantity of sugar and molasses, which had been furnished by Cavaroc & Son, was in the possession of Fairbanks & Gilman. The relations between Cavaroc & Son and Fairbanks & Gilman were not those of partners, each liable for the acts of the other. No part of the property seized ever belonged to Fairbanks & Gilman. What they were to receive from Cavaroc & Son was in reality only a stipulated price for work which they agreed to perform. Whether Cavaroc & Son owed anything to Fairbanks & Gilman or not on account of their transactions is another matter. But this question can not be decided in the present controversy. The only thing for us to decide is whether the property seized is or not liable to the payment of Fairbanks & Gilman's debt. We think it is not.

The district judge gave judgment in favor of plaintiffs, decreeing them entitled to a privilege on all the machinery and apparatus used and contained in Fairbanks & Gilman's refinery; dismissed the intervention of the New Orleans Mutual Insurance Company; maintained the intervention of Cavaroc & Son, and gave judgment in favor of Fairbanks & Gilman for two-thirds of the net profits that have been or may be hereafter realized from the sale of the sugar and molasses manufactured by them in their refinery, under their contract with Cavaroc & Son.

The judgment is partly right and partly wrong. It is right in so far as it gives to plaintiffs a privilege, by virtue of their seizure, upon the machinery found in the defendants' refinery, and placed there after the sale from them to the insurance company. It is wrong in decreeing the property purchased from the defendants by the insurance company liable to pay the plaintiffs' debt. It is wrong as regards the dismissal of the insurance company's intervention, in so far as the property purchased from the defendants is concerned. It is right in dismissing the intervention in respect to the machinery purchased by the defendants subsequent to the sale to the company. It was right in maintaining the intervention of Cavaroc & Son, but it is wrong in

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passing upon the question of interest in the profits of the sugar and molasses which had been manufactured by the defendants. This is not the proceeding in which such an interest can be ascertained.

It is therefore ordered that the judgment of the court *a qua* be amended by decreeing that all the machinery found in the building subsequent to the act of sale be subject to the plaintiffs' execution, and that the intervention of the insurance company be maintained in so far as the property mentioned in said act of sale is concerned; that the intervention of Cavaroc & Son be maintained; that the question of interest of Cavaroc & Son and Fairbanks & Gilman in the profits arising from the manufactured sugars and molasses, found in the building at the time of the seizure, be reserved, and the question of the landlord's privilege be reserved. Costs to be paid by D. & J. D. Edwards.

WYLY, J., *dissenting*. I am satisfied that the notarial act from Fairbanks & Gilman to the New Orleans Mutual Insurance Company was not intended to be a sale of the machinery. There was no intention to buy or to sell in that contract. Its real purpose was to secure the New Orleans Mutual Insurance Company for a loan to Fairbanks & Gilman, and the real contract was disguised under the form of a sale.

The machinery was personal property and was not actually delivered; there was not a moment of time that this property ceased to be in the possession of Fairbanks & Gilman.

As to plaintiffs there was no sale of this personal property, because there was no delivery; the notarial act added nothing to the validity of the contract. It is the real intention of the parties that determines the character of the contract, regardless of the form under which they have chosen to disguise it. Fairbanks & Gilman wished to secure the insurance company in a loan of \$25,000. They sold the machinery which they had in a leased building used by them as a sugar refinery and transferred the lease; in the same act they released the building and the machinery and reserved the right to redeem the property. They continued the operation of the refining without any change of possession, except what appeared merely on paper.

The plaintiffs, creditors of Fairbanks & Gilman, ought not to be evaded in the pursuit of their debtors by such a shallow device.

Can any one believe that the insurance company, unauthorized and prohibited by law from carrying on a commercial business, really intended to buy the machinery of Fairbanks & Gilman; to lease the house for the purpose of engaging in the commercial business of a sugar refinery, and before completing the act changed their mind, concluded not to go into the business, but would release the house to

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Fairbanks & Gilman and let them keep the machinery with the right of redemption? Why should the insurance company, prohibited from carrying on a refinery, lease from Fairbanks & Gilman their sugar refinery and in the same act release it to them, unless their real purpose was to get an apparent or constructive possession of the machinery remaining in the actual possession of Fairbanks & Gilman, and thereby obtain a title to this personal property as a security for the loan which they made to Fairbanks & Gilman?

The law ought not to be circumvented, and the sale of personal property without actual delivery ought not to be validated by an apparent but fictitious delivery, concocted by the ingenuity of debtors to evade the pursuit of their creditor. I can not believe that Fairbanks & Gilman really intended to sell their machinery and retire from the business of operating a sugar refinery; on the contrary, the record teems with evidence satisfying me that their purpose was to extend their business and operate upon a larger scale. For that purpose they immediately expended large sums in buying more machinery; and to aid them in a more extensive operation of the refinery, the insurance company actually loaned the money on the security of a fictitious sale of the machinery described in the notarial act.

In this litigation the insurance company not only claim the machinery described in the notarial act, but they claim the title of all the machinery subsequently bought by Fairbanks & Gilman, worth at least twenty-five thousand dollars. They ought not, under the disguise of a sale, to obtain a security on personal property which the law does not authorize; they ought not to succeed in their attempt to rescue all the machinery, the personal property of Fairbanks & Gilman, from the seizure of their judgment creditors, the plaintiffs herein.

I therefore dissent in this case.

HOWELL, J., *dissenting*. I concur in the dissenting opinion of Mr. Justice Wyly.

Rehearing refused.

No. 5724.

WIDOW ELIZABETH MARCHAL v. HARRIET HOOKER et als.

A judgment is not completed and can not operate as a judicial mortgage or have any effect until it is signed. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J. J. H. Ferguson, for plaintiff and appellant. J. Fisk and R. Shackleford, for defendants and appellees.

WYLY, J. On the first of July, 1874, Mrs. Harriet Hooker obtained judgment against John Barrera, but it was not signed until the third

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day of November following. On the twenty-eighth of July, 1874, however, she recorded it.

Subsequently, to wit, on the twenty-sixth of August, 1874, Barrera conveyed to plaintiff the property involved in this controversy, which the defendant contends is affected with a judicial mortgage resulting from the registry of her said unsigned judgment.

The question is, did the registry of defendant's unsigned judgment operate as a judicial mortgage on the property conveyed by Barrera to plaintiff in August, 1874, before said judgment was signed by the judge? We think not. Until signed the judgment was not completed, and it could not operate as a judicial mortgage or have any effect. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment. 5 N. S. 105.

It is therefore ordered that the judgment herein in favor of defendants be annulled, and it is decreed that plaintiff is the owner of the property described in the petition; that the same is not affected with the judicial mortgage set up by the defendants, and that plaintiff's injunction be perpetuated at the cost of defendant, Harriet Hooker, in both courts.

Rehearing refused.

No. 5592.

PEET, YALE & BOWLING v. J. J. McDANIEL & Co. L. H. GARDNER & Co. and A. BALDWIN, Garnishees.

The garnishment process was not intended and can not be used to litigate and settle side issues. In this case were the attachment sustained, it would be the engrafting of the suit of J. J. McDaniel v. L. H. Gardner & Co. and A. Baldwin for damages, upon the suit of Peet, Yale & Bowling v. J. J. McDaniel & Co., and making Peet, Yale & Bowling the plaintiffs in the said suit for damages.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Semmes & Mott*, for plaintiffs and appellants. *T. M. Gill, E. D. White, Kennard, Howe & Prentiss*, for defendants and appellees.

HOWELL, J. The plaintiffs, having obtained judgment against the defendants, issued garnishment process against L. H. Gardner & Co. and A. Baldwin, who answered that they were not indebted to the defendants and had no property belonging to them. The plaintiffs traversed these answers and averred that L. H. Gardner & Co. as principals and A. Baldwin as security on the attachment bond in the suit of L. H. Gardner & Co. v. J. J. McDaniel & Co., No. 4542 on the docket of the Sixth District Court, are indebted to the said McDaniel & Co. for the damage caused by the wrongful attachment therein; that said damage amounted to \$5000, for which sum said Gardner & Co.

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are indebted to said McDaniel & Co., and A. Baldwin is indebted to them in the sum of \$1300, the amount of the attachment bond signed by him as security. To this the garnishees excepted :

First—That the action of plaintiffs is premature, there being a suit against them by said McDaniel & Co. pending on exceptions not at issue on the merits and in which their liability for damages, if any, is involved.

Second—That such liability and the issues in said suit can not be tried collaterally as is attempted here.

Third—That there is no privity of action between plaintiffs and exceptors.

The exceptions were maintained and the plaintiffs appealed.

We think this proceeding, if properly termed a traverse, is premature, because the liability for the alleged damage is not ascertained and can be ascertained only in the suit for that purpose. The garnishment process was not intended and can not be used to litigate and settle side issues. This is really the ingrafting of the suit of J. J. McDaniel v. L. H. Gardner & Co. and A. Baldwin for damages upon the suit of Peet, Yale & Bowling v. J. J. McDaniel & Co., and making Peet, Yale & Bowling the plaintiffs in the said suit for damages. This can not be done, and the second ground of the exceptions is good.

Judgment affirmed.

No. 4089.

WIDOW STEWART v. V. M. KILLMARTIN AND J. B. DAVIS.

The defendant, a married woman to the knowledge of the broker who negotiated the lease on which she is sued, being without authority to make the contract or to stand in judgment, and not being shown to be pursuing a separate business for herself, the plaintiff can not recover.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Louque*, for plaintiff and appellant. *McGloin & Nixon*, for defendants and appellees.

HOWELL, J. This is a suit for rent according to a written lease of certain premises to Mrs. Killmartin, with J. B. Davis as security.

It is shown by competent evidence that Mrs. Killmartin was a married woman, and the house broker who negotiated the lease for plaintiff knew this fact. She was not authorized to make the contract of lease or to stand in judgment, nor is it shown that she was pursuing a separate business for herself. The judgment, therefore, as rendered adversely to the plaintiff, is correct.

Judgment affirmed.

No. 5749.

JOHN FITZPATRICK v. THE CITY OF NEW ORLEANS.

This suit originates in a claim against the city of New Orleans for salary and fees of office as clerk of the Superior Criminal Court, in alleged conformity with the second section of the act of 1874, establishing said court and providing for the clerk thereof. The act says that for issuing any process, the fee whereof is not determined by law, the judge of the court shall fix the compensation to which the clerk is entitled, in addition to his regular salary.

Process is so denominated, because it proceeds, or issues forth in order to bring the defendant into court to answer the charge preferred against him, and signifies the writ or judicial means by which he is brought to answer.

Motions made by the Attorney General, copies of indictments, etc., are not process. These are services, which seem to be paid for by the fixed salary of five thousand dollars allowed by the act.

The judge of the Superior Criminal Court has no power to certify the costs of any thing but process for which no provision has been made in the statute. The charges in this case were not for the issuing of any process. The judge, therefore, under the statute, had no power by his certificate of their correctness to make them a liability of the city, and his approval was binding upon no one.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Braughn, Buck & Dinkelspiel*, for plaintiff and appellee. *Samuel P. Blanc*, assistant city attorney, for defendant and appellant.

MORGAN, J. Plaintiff sues the city for \$7016 66, for salary and fees of office as Clerk of the Superior Criminal Court.

His bills have been approved by the judge of that court.

There is no contest as regards his salary. The city, however, contends that his account is swelled up by charges which he is not entitled, under the law, to make.

Plaintiff contends: First, that he has only charged such fees as are allowed by law; and, second, that the approval of his accounts by the judge is conclusive.

Section two of the act of 1874, p. 220, which established the Superior Criminal Court, and provided for a clerk thereof, says: "The clerk shall receive a salary of five thousand dollars per annum, and such fees as are now allowed by law for the issuing of attachments, subpoenas to witnesses and writs of *habeas corpus*, and also ten per cent. on all fines collected; and for issuing any process, the fee whereof is not provided by law, the judge of the court shall fix the compensation, which salary, fees and compensation shall be paid quarterly by the treasury or Department of Finance of the city of New Orleans."

Many of the charges which go to make up the total of the sum claimed from the city consist in "motions made by Attorney General to file indictment," "recording, docketing and indexing same," "copies of indictment," "reading information to jury," etc.

"Process is so denominated because it proceeds, or issues forth in order to bring the defendant into court to answer the charge preferred

against him, and signifies the writ or judicial means by which he is brought to answer." Bouvier's Law Dictionary, *verbo* Process.

Motions made by the Attorney General, copies of indictments, etc., are not process. These are services which, it seems, are paid by the salary of five thousand dollars.

The second ground relied upon by the plaintiff is, that the account sued on having been approved by the judge, the city is concluded. He quotes the one thousand and forty-second section of the Revised Statutes, which provides that "all expenses incurred in the different parishes of the State and in the city of New Orleans, by the arrest, confinement, etc., of persons accused or convicted of crimes*** and all expenses whatever attending criminal proceedings shall be paid*** after an account thereof shall be duly certified to be correct by the clerk of the court and the presiding judge thereof." And he relies upon the cases of *Parker v. Robertson*, 14 An. 249; *Shaw v. Howell*, 18 An. 195, and on the case of the *City v. Patton*, lately decided.

Parker's claim was for expenses in criminal proceedings. His accounts were approved by the judge and clerk. The court said: "The act of 1857 leaves it to the wisdom of the judge and clerk to interpret the act of 1857, and to decide what are the expenses intended by it.*** The Legislature have manifested their compliance by clothing them with the power of certifying these accounts." But the decision goes on: "It is true that as the certificate is, according to Mr. Crittenden, the evidence of the exercise of a special and limited jurisdiction, it must show upon its face a case within that jurisdiction. If, for example, the certificate of the judge and clerk should show upon its face that it was for fees in civil suits, the auditor might refuse to authorize its payment, because there is no law empowering the judge and clerk to certify them in order to have them paid by the State."

The case supposed is the case before us. The judge has no power to certify the costs of any thing but processes, for which no provision had been made in the statute. The charges complained of were not for the issuing of any process. The judge, therefore, under the statute, had no power, by his certificate of their correctness, to make them a liability of the city, and his approval was binding upon no one.

Shaw's case was identical in facts with Parker's case, and Patton's case does not differ from either.

In our opinion the account A should be reduced \$1802 05, and account B \$398 75.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended by reducing the same from \$9089 21 to \$6888 41, and that, as thus amended, it be affirmed; defendant to pay costs in the court below, the costs of appeal to be borne by plaintiff.

Parish of West Baton Rouge v. Morris.

No. 5676.

PARISH OF WEST BATON ROUGE v. ROBERT MORRIS.

In this instance the claim of the plaintiff against the defendant, tax collector, for uncollected taxes and licenses, is unfounded in law and equity. If the defendant is responsible to the plaintiff for the uncollected taxes, the defendant would have the right to continue to collect them after his removal from office—which he can not do.

There is no evidence that the defendant received the warrants in payment of taxes, which he tendered in settlement, or that he was authorized to receive them. They were therefore properly refused by the treasurer in settlement of taxes collected.

The defendant was the agent of the parish and he is bound to return to the parish the amount of taxes he received in currency, and the court will presume that he received currency, unless the law authorized the receipt of warrants in payment of taxes, and the evidence showed that he actually received warrants in settlement of the taxes. Tax collectors can not be permitted to speculate in parish warrants.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.* Jury trial. *N. W. Pope*, district attorney, *pro tem.*, *D. N. Barrow, J. O. Fuqua*, for plaintiff and appellant. *A. S. Herron, R. G. Posey, W. H. Goodale*, for defendant and appellee.

LUDELING, C. J. This is a suit for the parish taxes of 1869, 1870 and 1871 and licenses for said years, alleged to be due by the defendant, to wit, \$13,315.

The defendant admits that he was parish tax collector for said years and that he received the tax rolls and licenses, and he alleges that he has paid into the treasury all the taxes and licenses collected by him, except a small balance in currency and the amount of parish warrants, which he says he has tendered to the parish treasurer, together with a list of delinquent taxpayers and unissued licenses. The plaintiff's theory is that the collector is responsible for the taxes and licenses not collected. The evidence shows that the defendant delivered to his successor the tax rolls, showing the uncollected taxes, and that the plaintiff is now collecting and has been collecting the taxes for which the defendant is sued. This shows that the claim of the plaintiff against the defendant for uncollected taxes and licenses is unfounded in equity or in law. If the defendant is responsible to the plaintiff for the uncollected taxes, the defendant would have had the right to continue to collect them after his removal from office. This, it is clear, under the law, he could not do. There is no evidence in this record to show that the defendant received the warrants which he tendered in settlement, in payment of taxes, or that he was authorized to receive them. They were, therefore, properly refused in settlement of taxes collected. The defendant was the agent of the parish, and he is bound to return to the parish the amount of taxes he received, in currency—and we will presume he received currency—unless the law authorized the receipt of warrants in payment of taxes, and the evidence showed that he actually received warrants in settlement of the taxes. Tax collectors can not be permitted thus to speculate in the warrants of the parish.

Parish of West Baton Rouge v. Morris.

We do not consider it necessary to decide in this case the various questions raised by bills of exceptions taken during the course of the trial. The plaintiff charges that the defendant as tax collector owes her \$13,315 09. The defendant admits that he was tax collector, and pleads payment or tender of payment and settlement. The simple inquiry, therefore, is the truth or correctness of defendant's pleas.

It is therefore ordered that verdict of the jury and the judgment of the district court be set aside and annulled, and it is ordered and adjudged that there be judgment in favor of the plaintiff and against the defendant for the sum of two thousand one hundred and ninety-five dollars and eighty-five cents, with legal interest from judicial demand, and costs in both courts.

Rehearing refused.

No. 5356.

CITIZENS' BANK OF LOUISIANA v. ST. LOUIS HOTEL ASSOCIATION AND
J. COCKREM, Receiver and Third Opponent.

In this instance the contract for repairs and improvements was entered into on the seventeenth of June and was not recorded until the nineteenth of said month. By the law, the privilege of the contractor in such a case does not have a preference over creditors whose mortgages then had force.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. Pitot and A. Grima*, for plaintiff and appellant. *Honor & Benedict and J. D. Rouse*, for intervenor and third opponent, appellee. *F. Fuselier*, for the St. Louis Hotel Association, appellee.

HOWELL, J. This is a contest between the vendor of real estate and the holder of the claim of a contractor for repairs and improvements.

There was a separate appraisal of the land and buildings respectively, and the third opponent was allowed the claim asserted by him for the repairs and improvements.

The plaintiff invokes article 3274 R. C. C., and contends that the preference so allowed was lost by the failure to record the contract, of which the claim springs, on the day it was entered into, as provided in said article.

This position is correct. The contract was entered into on the seventeenth of June, and was not recorded until the nineteenth of said month. By the law the privilege of the contractor in such case does not have a preference over creditors whose mortgages then had force. See *Gay & Co. v. Bovard*, Opinion Book 44, p. 224.

It is therefore ordered that the judgment appealed from be reversed and that the demand of intervenor and third opponent for preference or privilege herein be rejected, with costs in both courts.

Rehearing refused.

No. 4990.

AIMEE JUMONVILLE, wife of E. VIVES v. A. JACKSON SHARP.

The delay to record an act of sale can not defeat the vendor's privilege and mortgage in favor of a creditor of the vendee who held a legal or judicial mortgage against him, if the mortgage and privilege were recorded at the same time with the act of sale.

A PPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J. J. B. Whittington*, for plaintiff and appellee. *G. Schmidt*, for defendant and appellant.

HOWELL, J. This is a hypothecary action, by which the plaintiff seeks to enforce the judgment she obtained against her husband, upon property in the possession of defendant and subject, as she alleges, to her legal mortgage.

The defense is that her judgment is a nullity, having been obtained by fraudulent collusion between herself and husband, and not having been executed for two years after rendition; that a portion of it is slave consideration, and that her mortgage has not been registered.

From a judgment in favor of plaintiff the defendant appealed.

The plaintiff's judgment against her husband, and which she seeks to enforce against the defendant, is for \$7300 60, with five per cent. interest from the seventeenth of September, 1867, and mortgage for \$500 from the first of April, 1854; \$431 25 from the third of April, 1858; \$431 25 from the third of April, 1859; \$431 25 from the third of April, 1860; \$5113 87 from the eighteenth of February, 1861, and \$392 98 from the thirtieth of April, 1861.

The evidence sufficiently establishes the validity of plaintiff's judgment against her husband as to the amounts and dates, its execution and registry, and the only serious question relates to the want of authority in the wife to institute either the suit against her husband or the present action. This question of authority was not raised in the lower court. As to her authority to prosecute this suit, we find in the record an appearance by the husband for the purpose of giving such authority, which is sufficient. In regard to the suit against her husband, there is no order of the judge authorizing her to institute and prosecute it, as she specially prayed; but, as held in the case of *Le Blanc v. Dubroca*, 6 An. 360, article 105 C. P., making such authorization necessary, is intended to protect the husband against unadvised and vexatious family suits, and, being an exception in his favor, does not afford ground for annulling a judgment against him in a controversy between his creditors and his wife. We are disposed to adhere to this view, and we do not think such interpretation of said article is judicial annulment of the law, as contended by counsel.

The question of slave consideration does not seem to be pressed be-

fore us; but the evidence does not satisfy us that any part of the wife's claim, as allowed, was for the price of slaves.

Her mortgage was duly recorded before 1870, which preserved it as it existed from the dates fixed in her judgment, and the act under which defendant's author acquired his rights, not having been recorded before her mortgage operated upon and attached to the land in question, her mortgage takes preference. See 20 An. 79.

The judgment in this case, however, has given the plaintiff more interest than she is entitled to, and several items not embraced in her demand, in which respects it must be changed.

It is therefore ordered that the judgment appealed from be set aside and proceeding to render such judgment as should have been given below, it is ordered that defendant, A. J. Sharp, be condemned to pay the plaintiff the sum of seven thousand three hundred dollars and sixty cents, with five per cent. thereon from the seventeenth of September, 1867, and costs in the lower court, and in default thereof that the property described in plaintiff's petition and now owned by the defendant be seized and sold under plaintiff's mortgage for \$500 from first of April, 1854; for \$431 25 from the third of April, 1858; for \$431 25 from the third of April, 1859; for \$431 25 from the third of April, 1860; for \$5113 87 from the eighteenth of February, 1861, and for \$392 98 from the thirtieth of April, 1861, and costs below. The costs of appeal to be paid by plaintiff and appellee.

ON REHEARING.

LUDELING, C. J. This is a contest between the plaintiff, who is trying to subject to her legal mortgage a plantation in the possession of the defendant, a third possessor.

The facts, disclosed by the record, are that the plaintiff has a judgment against her husband, Edward Vives, for a large sum of money, and to secure this sum she has a legal mortgage against the property which may have been owned by the husband since the existence of her claim. The property in the possession of Sharp was sold to Edward Vives in 1861, and a mortgage and vender's privilege were retained on the property. The act of sale was not recorded till 1866, at which time the mortgage and privilege were also duly recorded in the parish where the property is situated. This property was seized and sold to pay a part of the price, secured by the vendor's privilege and mortgage, and the vendee at that sale sold to Jackson Sharp.

After this the wife of Edward Vives obtained her judgment and recorded it. She now claims that her legal or tacit mortgage was superior to the vendor's privilege and mortgage, and that the property bought by Sharp is subject to her mortgage, because the mortgage and

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privilege of Dalferes, the vendor of Vives, her husband, were not recorded immediately after the sale.

The mortgage and privilege were recorded at the same time the act of sale was recorded in the records of the parish.

In the case of *Rochereau v. Colomb*, recently decided, we held that the delay to record the act of sale could not defeat the vendor's privilege and mortgage in favor of a creditor of the vendee, who held a legal or judicial mortgage against him, if the mortgage and privilege were recorded at the same time with the act of sale.

For the reasons given in that case, it is ordered and adjudged that our former decree be annulled, and that the judgment of the court *a qua* be set aside.

It is further ordered and adjudged that the plaintiff's demand be rejected, with costs of both courts.

No. 5527.

SUCCESSION OF ERNEST POREE.

Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Charles Louque*, for appellants. *A. J. Villere*, for appellees.

LUDELING, C. J. Charles F. Poree died, leaving five children. Helena Poree is a minor. The property remained in their possession without opening the succession of the father. Subsequently, Ernest, one of the children, died, and Morand, a creditor, caused himself to be appointed administrator of said succession, and sued the other heirs for a partition of a tract of land owned by the heirs. He caused a tutor *ad hoc* to be appointed to represent *Aline* Poree. The person appointed never qualified as tutor *ad hoc*.

Citation addressed to *Aline* Poree was served on the person appointed to represent her; he filed an answer stating that the minor's name was *Helena* Poree, and reserving the rights of the minor to have the terms of sale fixed by a family meeting. A judgment by default was confirmed against the heirs of age, and the property was ordered to be sold for cash, and it was sold. In the meantime, one of the brothers was appointed tutor to his sister, and all the heirs united in taking an appeal from the judgment in the suit for partition, and also in a rule taken against the vendee and administrator aforesaid to show cause why the sale aforesaid should not be set aside, the price whereof is still in the sheriff's hands, and from the judgment dismissing this rule they also appealed.

It is necessary to notice only the following objection urged against the judgment of partition and sale—that all the parties in interest were not parties to the suit of partition. *Helena Poree*, a minor, was never cited. The judgment was an absolute nullity, and the sale made under it is also null and void.

It is therefore ordered that the judgment in the partition suit be set aside and the sale made under it be declared void, and that the case be remanded to be proceeded with according to law. Costs of appeal to be paid by the appellee and the costs of the lower court to be paid by N. St. Morand, administrator.

No. 4935.

JAMES H. LYNCH *v.* MRS. E. KENNEDY AND HUSBAND.

The plaintiff is himself a ship carpenter, and all the defects which he alleges to be in the schooner which he purchased at a public sale, if they existed, being apparent, he can not complain that the property he purchased was not what he had a right to expect it would be.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Bentinck Egan*, for plaintiff and appellee. *Ogden & Hill, Lacey & Butler*, for defendants and appellants.

MORGAN, J. Plaintiff purchased a schooner from the defendants for five thousand dollars, two thousand five hundred dollars cash and the balance in his two notes, one for five hundred dollars, payable one month after date; the other for two thousand dollars, payable four months after date. The purchase was made on the twenty-sixth of February, 1873.

On the twentieth of March following he brought this suit to enjoin the defendants from disposing of the notes, and to recover \$2141 21 to be credited on the notes.

His allegations are that the defendants fraudulently concealed from him the draught of the vessel, and that the rigging, sails, etc., were not new, as they were represented to be.

The sale was made by public act, and in that act nothing is said as to the draught of the schooner or the condition of her rigging.

The plaintiff is himself a ship carpenter, and all the defects of which he complains were, if they existed, apparent. He can not, therefore, complain that the property he purchased was not what he had a right to expect it would be.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed; that the injunction herein issued be dissolved; that this suit be dismissed, and that the plaintiff pay costs in both courts.

Rehearing refused.

No. 5576.

NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY v. T. S. DUGAN.

The defense of the surety on an appeal bond furnished by the plaintiffs, on the ground that the necessary proceedings were not had against the principals, can not be sustained, two executions having been issued without effect, and the United States Circuit Court having specially enjoined the execution of any writ against the plaintiffs.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. J. D. Augustin*, for William Harris, surety on appeal bond, and appellant. *Legendre & Poché*, for defendant and appellee.

HOWELL, J. William Harris has appealed from a judgment against him for \$1000, as surety on an appeal bond furnished by the plaintiffs. His defense is that the necessary proceedings were not had against the principals. The evidence shows that two executions were issued without effect, one in New Orleans and the other in St. Charles. It is shown that the United States Circuit Court had possession of the property of the plaintiffs, and specially enjoined the execution of any writ against them. This brings the case within the doctrine in *Alley v. Hawthorn*, 1 An. 123, and *Lepretre v. Barthet*, 25 An. 124. It differs materially from the circumstances in the case of *Saux et al. v. Betz*, just decided.

Judgment affirmed.

Rehearing refused.

No. 5305.

MRS. VIRGINIA C. BURKE, Testamentary Executrix, v. MRS. CLARISSA BISHOP and MRS. RISLEY.

The check, the amount of which plaintiff, in her capacity of testamentary executrix, seeks to recover as having been embezzled by one of the defendants, Mrs. Risley, was not of Hampton Elliott, whose succession she represents, but was a check drawn by Britton and Kountz to the order of said Elliott. The moment Elliott indorsed it and handed it to Mrs. Risley, his property in it ceased. It was not his money which the bank paid when it paid the check after his death. It was Britton and Kountz's money. The bank paid under instructions from them and not under any mandate from Elliott.

A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it.

APPEAL from the Sixth District Court, parish of Orleans. *Sauvier, J. Labatt, Aroni and Clinton*, for plaintiff and appellee. *J. A. Campbell, J. S. Whitaker, E. Bermudez*, for defendants and appellants.

MORGAN, J. Plaintiff, in her representative capacity, seeks to recover from the defendants \$1434 47, amount of a check drawn by

Mrs. Virginia C. Burke, Testamentary Executrix, v. Mrs. Clarissa Bishop and Mrs. Risley.

Britton and Kountz, to the order of Hampton Elliott, and by him indorsed in blank, and which she alleges the defendants embezzled and misappropriated.

There was judgment in favor of the plaintiff.

As regards Mrs. Bishop, the record shows that she was a married woman when the suit was instituted, and she was not authorized to stand in judgment by her husband or by the judge. As to her, therefore, the judgment was not authorized.

In respect to Mrs. Risley, her codefendant, she claims that the check was a manual gift from Elliott to herself and that she can not be forced to return it.

The facts are that Elliott gave the check to Mrs. Risley on the twenty-seventh March, 1872. On that day, in the afternoon before three o'clock, Mrs. Bishop gave the check to a visitor at the house, who had transacted other business for her, and requested him to have it cashed. He advised her to deposit it in the bank where she kept an account, and he took the check from her and her bank book to have the deposit made. He did not make the deposit that afternoon. The following day was Good Friday, and the bank was closed, so that he could not deposit it on that day. On Saturday he deposited it, and on Monday morning it was paid. On Friday Hampton Elliott died. He was therefore dead when the check was paid. The position of Mrs. Burke is, that the succession is protected by the 1536th article of the Code, which provides that "An act shall be passed before a notary public and two witnesses, of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity;" and also by the 1538th article of the same Code, which declares that "a donation *inter vivos*, even of movable effects, will not be valid, unless an act be passed of the same, as is before prescribed." And in support of her pretensions she relies upon the succession of DePouilly, 22 An. 97; 12 R. 76; 17 La. 144. The defendant rests her case upon the 1539th article of the Code, which says that "the manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality."

If the thing given to Mrs. Risley had been a promissory note, her case would be covered by the cases of *Barriere v. Gladding*, 17 La. 144; *Morres v. Compton*, 12 R. 76; *Succession of DePouilly*, 22 An. 97; in all of which cases it was held that the donation of a promissory note must be preceded by the formalities required by article 1538 (1525) of the Code.

If it had been a check drawn by Hampton Elliott, and he had died before the check was presented, and the check was a donation, the

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check would have been worthless, because by the demise of the donor his mandate to his agent, the bank, was revoked.

But the check in question was not of Hampton Elliott's drawing. It was a check drawn to his order. The moment he indorsed it and handed it over to Mrs. Risley, his property in it ceased. It was not his money which the bank paid when it paid the check. It was Britton and Kountz's money. The bank paid under instructions from them and not under any mandate from Elliott.

A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it.

Under these circumstances the judgment which condemns her to return it is erroneous.

It is therefore ordered, adjudged and decreed that the judgment of the district court as regards Mrs. Bishop, be annulled, and that as regards Mrs. Risley, it be also avoided, annulled and reversed, and that there be judgment in her favor with costs in both courts.

LUDELING, C. J., *dissenting*. I dissent in this case. The defendants filed only a general denial; and, in my opinion, there is no evidence worthy of credit, that the check was given to either of the defendants. Elliot died in the house occupied by the defendants, and after his death the check, which had been sent to Elliott a day or two before his death was collected by the defendants. I think plaintiff should have judgment for the amount of the check.

TALIAFERRO, J., *dissenting*. I concur with the Chief Justice in his dissenting opinion.

Rehearing refused.

No. 3866.

RANDOLPH, SINGLETON & BROWNE v. JOSEPH W. CARROLL.

It is a rule long settled by this court that it will not be implicitly governed in regard to questions relating to the value of professional services rendered by attorneys at law to their clients, by the opinions of legal men taken in evidence, but will be guided by a conscientious estimate of the value of the services performed, and will, of itself, fix the amount, without reference to the opinions of witnesses.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J.* Jury trial. *Finney & Miller*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, personally.

TALIAFERRO, J. This suit is brought to recover the sum of twenty-

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two hundred dollars for professional services rendered the defendant by the plaintiffs as attorneys at law. The defense is that the amount claimed is excessive and out of proportion to the labor performed.

The plaintiffs had judgment as prayed for, and the defendant has appealed.

It is a rule long settled by this court that it will not be implicitly governed in regard to questions relating to the value of professional services rendered their clients by attorneys at law, by the opinions of legal men taken in evidence; but will be guided by a conscientious estimate of the value of the services performed, and will, of itself, fix the amount, without reference to the opinions of witnesses. In this case, from the services shown to have been performed, we are not satisfied with the judgment of the lower court. It is for a larger sum than we conclude to be a fair compensation for the labor and services bestowed.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that the plaintiffs recover from defendant twelve hundred dollars, the defendant paying costs in the lower court, and the plaintiffs and appellees the costs of this appeal.

MORGAN, J., *dissenting*. I think the fee charged by the plaintiffs, and established by evidence, is reasonable, and that the full amount claimed by them was earned and should be paid. I therefore dissent from the reduction made thereto.

Rehearing refused.

No. 3508.

EDGAR A. SWITZER v. MRS. M. A. ZEILLER et als.*

The defendants in this instance are the legal representatives of one Zeller, who went security on a release bond given in the suit of Switzer v. Steamboat Frolic. The defense is that the assignee in bankruptcy for the owners of steamboat Frolic had no right to stand in judgment for said owners, and that the State court had no jurisdiction to render a judgment against the assignee. This defense is not well founded. The bankrupts having been discharged, no judgment against them could be obtained, and there is nothing in the bankrupt law which required the discontinuance of suits already commenced.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *A. Pardee, J. Egan & Whittemore*, for plaintiff and appellant. *A. G. Brice*, and *E. T. Merriok, Race & Foster*, for defendants and appellees.

LUDELING, C. J. This suit grows out of the suit of Switzer v. Steamboat Frolic and owners, recently decided by this court. In that suit *E. A. Switzer* obtained a judgment against *E. E. Norton*, assignee in bankruptcy of the defendants, with a recognition of a privilege on the

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steamboat, which had been released on bond, with F. C. Zeller as security. The defendants in this suit are his legal representatives, and this suit is to enforce the obligation of said bond.

The defense is that the judgment against Norton, assignee, is absolutely null and void, because not rendered against Heinn and wife, the owners of the Frolic, and the assignee had not the right to stand in judgment for them, and the State court had no jurisdiction to render a judgment against the assignee, etc.

The bankrupts having been discharged, no judgment against them could be obtained, and there is nothing in the bankrupt law which required the discontinuance of suits already commenced. See Kemp's Bankruptcy, p. 186. See also case of E. A. Switzer v. John Heinn and Mary Heinn, recently decided, and authorities therein cited.

It is therefore ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law; and that the appellee pay costs of appeal.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

No. 5736.

STATE OF LOUISIANA ex rel. MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY v. THE ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

The intervenor in this case, J. Q. A. Fellows, has not given bond for appeal. It is not sufficient for him to have joined the city in taking an appeal, and that the city has given bond for costs, the only bond that could be required. The intervenor is a separate, independent party in the litigation. The obligation of the city to pay costs does not cover the costs of intervention.

This suit is for the same purpose as that stated in No. 5735, previously reported. As pledgers, the relators have sufficient interest to demand that respondents shall perform the duties required of them by their pledgee.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Charles S. Rice*, for relator and appellee. *B. F. Jonas*, city attorney, *Samuel P. Blanc*, assistant city attorney, for respondents and appellants.

ON MOTION TO DISMISS.

TALIAFERRO, J. There is a motion to dismiss the appeal taken in this case by J. Q. A. Fellows, intervenor, on the ground that he has not given bond for an appeal. The record shows that the intervenor has failed to give appeal bond. He contends, however, that he joined the city in taking an appeal, and that the city has given bond for costs, the only bond that could be required in the case.

State ex rel. Mississippi and Mexican Gulf Canal Co. v. Administrators city of New Orleans.

The intervenor is a separate independent party in the litigation. The obligation of the city to pay costs does not cover the costs incurred by the intervention. We think the intervenor should have given bond.

The motion to dismiss is sustained, and it is ordered that the appeal, so far as it relates to the intervenor, be dismissed.

ON THE MERITS.

WYLY, J. This case presents the same question as presented in the case just decided, namely, whether the respondents can be compelled by mandamus to collect the judgments for drainage assessments to provide funds to pay the warrants issued by the Administrator of Accounts under act 30 of the acts of 1871.

This proceeding is for the same purpose as that stated in the case just decided. The cases were tried together and the same decree entered in each.

We regard the assignment to Van Norden by the relators herein merely as a pledge of their franchises.

As pledgee, Van Norden had sufficient interest to compel the respondents to perform the duty imposed on them by act 30 of the acts of 1871.

As pledgers, the relators have sufficient interest to demand that the respondents shall perform the duty required of them by Van Norden.

Judgment affirmed.

No. 5529.

CITY OF NEW ORLEANS v. CITY HOTEL, R. S. MORSE AND JAMES E. ZUNTS.

The tax bill on which this suit is brought is made out against the City Hotel, R. S. Morse and James E. Zunts. The judgment was that the City Hotel, etc., is hereby condemned to pay, etc. This proceeding was had in the case entitled the city of New Orleans v. City Hotel, R. S. Morse and James E. Zunts, who have appealed on the ground that they know of no law which justifies a judgment against property, the owners of which are not unknown.

There can be no doubt, under the circumstances, that the appellants were the parties who were condemned in the judgment, which must be construed with reference to the pleadings in the case and the obligation sought to be enforced. This is necessarily implied in their application for an appeal.

It is just as much the duty of the plaintiff as of the defendants to see that the clerk of the court, or the judge, makes no error in entering the judgment.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. S. P. Blanc*, assistant city attorney, for plaintiff and appellee. *J. W. Thomas*, for defendants and appellants.

HOWELL, J. The defendants, R. S. Morse and J. E. Zunts, have appealed from the judgment in this case, which is for taxes, and the only complaint they make is, that it is rendered against the City Hotel, and

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they know of no law, they say, that justifies a judgment against property, the owners of which are not unknown.

The tax bill is made out against the "City Hotel, R. S. Morse and James E. Zunts;" all the forms of law are observed in the institution and conduct of the legal and judicial proceedings; default taken and confirmed, the judgment being that the defendant, City Hotel, etc., is hereby condemned to pay, etc. This proceeding was had in the case entitled *City of New Orleans v. City Hotel, R. S. Morse and James E. Zunts*, with the proper number on the docket. These two parties applied for and obtained an appeal, alleging that they are aggrieved by the final judgment rendered herein.

We think there can be no doubt, under these circumstances, that the appellants were the parties who were condemned in this judgment, which must be construed with reference to the pleadings in the case and the obligation sought to be enforced. This is necessarily implied in their application for an appeal. See 3 La. 275; 4 La. 100; 5 La. 284; 14 An. 831.

The city attorney, however, concedes that the judgment is for a sum several hundred dollars larger than the tax bill which was reduced, and is in the record, along with the original bill, the error arising from following the latter in drawing up the judgment. He asks, however, that the city be not condemned to pay costs of appeal, as the error could and would have been corrected upon the suggestion of the defendants. It was just as much the duty of the plaintiff as the defendants to see that the clerk of the court did his duty, or the judge made no error in entering the judgment, and since the judgment was rendered on default, and it may be that the defendants did not know the error until too late for new trial, in making this necessary change we will draw the judgment in due form.

It is therefore ordered that the judgment appealed from be reversed, and that the judgment by default herein entered on the third day of November, A. D. 1874, be now confirmed and made final, and that the said defendants, the City Hotel, R. S. Morse and James E. Zunts, are hereby condemned to pay to the city of New Orleans the sum of four thousand three hundred and seventy-five dollars, with ten per cent. interest per annum from the thirty-first day of July, 1874, until paid, seventy-five cents costs of advertising, and all costs of suit in the district court, and with lien and privilege according to law on the property described in the tax rolls and bills or claims on file. And it is further ordered that for the payment of the sheriff's and clerk's costs they do have a lien and privilege upon the judgment herein rendered. Costs of appeal to be paid by the appellee, the city of New Orleans.

Rehearing refused.

No. 5723.

LOUISIANA SAVINGS BANK AND SAFE DEPOSIT COMPANY v. CYRUS BUSSEY.

In this instance, under the contract of pledge, the plaintiff had special authority to sell the collaterals at public or private sale at its option.

Article 3165 of the Revised Code was amended on the twenty-third of February, 1872, so as to make it lawful for the pledgor to authorize the sale or other disposition of the property pledged, in such manner as may be agreed on by the parties, without the intervention of courts of justice. According to the judicial admissions of the defendant, it appears that the pledge was taken after the amendment of article 3165.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Rice & Whitaker*, for plaintiff and appellee. *H. C. Dibble*, for defendant and appellant.

WYLY, J. The defendant, who was sued as an indorser of a promissory note, appeals from a judgment condemning him to pay a balance of some \$4800 due on said note.

Besides the general denial the answer sets up a special defense that at the time the note in suit was discounted by plaintiff, certain shares of the stock of the Mexican Gulf Ship Canal Company were given in pledge, or as collateral security; that "plaintiff, instead of availing itself of the collateral security in its hands at the time of the maturity of the note to satisfy the same, held the aforesaid stock for several months, and until it had largely depreciated in value. And respondent further shows that at length, that is to say in the month of March or April, 1873, the said bank assumed to make a private sale of the stock aforesaid, and that said stock was so disposed of without any warrant of law. Respondent shows that plaintiff had no authority to dispose of said collateral security except by sale at public auction;" and the amount plaintiff pretends to have realized, and which is credited on the note, was not the value of said stock; that if it had been sold at public auction it would have yielded enough to pay the balance due on said note.

This special defense is not established by the evidence in the record. Under the contract of pledge the plaintiff had special authority to sell the collaterals at public or private sale at its option. Furthermore, we find in the record the following written request of the defendant to plaintiff to sell the stock:

"New Orleans, March 29, 1873. W. Van Norden, president of the Louisiana Savings Bank: I wish you to sell the stock of the Mississippi and Mexican Gulf Canal Company, pledged to your bank to secure a note of the canal company indorsed by me. CYRUS BUSSEY."

A few days thereafter, that is to say, on the second of April, 1873, the stock was sold and the proceeds credited on the note. The attempt

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to prove the stock was worth more than the amount realized by plaintiff was a failure. Notwithstanding the allegations of the answer and the written request of the defendant, he contends in his brief that the authority to sell in the contract of pledge was stricken with nullity by article 3165 of the Revised Code. That article was amended on the twenty-third February, 1872, so as to make it lawful for the pledger to authorize the sale or other disposition of the property pledged in such manner as may be agreed on by the parties without the intervention of the courts of justice.

The note in suit was made subsequently, to wit: On the second of April, 1872, and in the answer the defendant alleges that "at the time the note was taken for discount by the bank, plaintiff accepted as collateral security for the payment of the note one hundred and twenty shares of the stock of the Mississippi and Mexican Gulf Ship Canal Company." According to the judicial admissions of the defendant, therefore, it appears that the pledge was taken after the amendment of article 3165.

It is unnecessary to notice the bills of exceptions, as the judgment appealed from is correct in view of all the evidence in the record.

Judgment affirmed.

No. 5444.

MILTON BENNER v. WARNER VAN NORDEN et al.

The motives which influence a person to exercise a legal right do not destroy that right or affect its enforcement.

A valuable consideration may, in general terms, be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side; and if either of these exist, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder.

He who sells a credit or incorporeal right warrants its existence at the time of the transfer.

The seller does not warrant the solvency of the debtor, unless he has agreed to do so.

There is no lesion in such sales, and no relief can be granted.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Randolph, Singleton & Browne, J. W. Huntington*, for plaintiff and appellee. *Rice & Whitaker*, for defendants and appellants.

MORGAN, J. Van Norden, one of the defendants, is sued on a promissory note for \$2500. The note is dated New Orleans, thirteenth June, 1874, and is payable seven months after date. Palmer, the other defendant, is sued as guarantor that the note would be paid at maturity. The execution of the note is admitted. The defense is, as to the maker, that it was given without any legal or valid consideration, and that the transaction or contract under which the note was given was

illegal, reprobated by law, and of no effect. Palmer pleads, first, the general issue, and second, he adopts Van Norden's answer.

The litigation grows out of transactions connected with the Mississippi and Mexican Gulf Ship Canal Company, a corporation established by the Legislature. In 1871 the Legislature passed an act entitled "An act for the drainage of New Orleans." See acts of 1871, p. 75. The first section of this act provides that the Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to excavate drainage canals and build protection levees within the then corporate limits of New Orleans and Carrollton, under certain conditions and stipulations therein expressed. Other sections mapped out the work which was to be done by the company. It was on the largest possible scale. One canal and protection levee was to be built near the shore of Lake Pontchartrain; the canal was to be not less than sixty-five feet wide on the surface and fifteen feet deep in the middle. The protection levee was to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain. Another canal and protection levee was authorized to be built below the city to connect the lower end of the protection levee, along the lake, with the Mississippi river, of a sufficient size to fully protect the city from overflow, and to construct a like canal and protection levee above the city. The company was also authorized and empowered to excavate canals of the dimensions and at such localities as might be fixed by the board of administrators of the city as were necessary to fully drain the area bounded by the protection levees contemplated by the act. The company was also authorized to dig all the smaller canals required for the drainage of New Orleans and the lands in the rear of the city, the required width of which would be ten feet or more in width.

During the prosecution of these works, the board of administrators were required to build and run all the pumps and draining machines necessary to lift the drainage water from the canal or canals over into Lake Pontchartrain, and to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands. The eighth section of the act provided that at the end of every month, the city surveyor, or an engineer appointed by the board of administrators for that purpose, should examine the work which had been done by the company during that month, and upon a measurement of the width and depth of the canal, canals, or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It was made the duty of the administra-

tor of accounts, on the presentation to him of the certificate of the city surveyor or engineer, by the president of the company, to draw a warrant or warrants on the administrator of finance, in payment of the work done, at the rate of fifty cents per cubic yard of excavation, and fifty cents per cubic yard for the protection levee, the warrants to be of such denomination as might be required by the president of the company. It was made the duty of the administrator of finance to pay these warrants on presentation, and should there not be any funds in the city treasury, he was required to indorse upon the same the date of presentation, after which date the warrant or warrants were to bear interest at the rate of eight per cent. per annum until paid.

On the twenty-second May, 1872, the company, through its proper and authorized officer, by public act, declared that whereas they had always been paid in warrants for the work done by them, which warrants were only convertible to cash at a discount of twenty-five per cent. and more; whereas the expenditures of the company in constructing and executing their work have to be paid in cash; and whereas, Warner Van Norden has agreed to advance to the company during the ensuing twelve months \$150,000, to meet the expenses of their work, the \$150,000 to be given in such installments as may be deemed necessary as the work progresses; therefore, to secure the payment of this loan, together with the interest thereon, the company transferred to Van Norden its rights and advantages granted under the act of the Legislature above quoted, as well as to all sums of money, profits and benefits that might inure or be realized by virtue of the performance and execution of the work therein provided for; and the company agreed to transfer to Van Norden all certificates, cash, warrants or bills that might be made out and delivered by the surveyor or other officers of the city for all work done by the company.

On the twenty-second November, 1872, the company, by public act, acknowledged itself indebted to Van Norden in the sum of \$161,962 86, advanced by him to the company to enable it to do the work required of it under the act of the Legislature. In part payment thereof it transferred to him certain property estimated at \$50,000. This left the debt due him \$111,962 86.

Benner was a director in the company. So was one Champlin. Benner frequently said to Van Norden, as is to be gathered from the testimony in the record (uncontradicted by him when on the stand), that Van Norden had what he, Benner, called "a big thing," and that "he wanted some of it;" that some of the money received for the work done for the city should come to him; that he had got it all fixed, and that if Van Norden would come down and fix it as he wanted, he would make every thing all right; if not, he would lose by it.

To these appeals and threats Van Norden seems to have turned a deaf ear. Champlin then instituted proceedings in the United States courts to force the company into bankruptcy. He was a director in the company, a stockholder and a creditor. His stock consisted of two hundred shares of \$100 each. His credit was the company's warrants for \$1500. It was upon this last that the proceedings in bankruptcy were commenced. The act of bankruptcy, as alleged, was the sale of the company's property to Van Norden, on the twenty-third of November, 1872.

Then commenced the publication of a series of articles in one of the public papers of this city, in which Van Norden's conduct was severely criticized, and in which many things damaging to the character of any man were boldly charged against him. They were conspicuously published, and attention called to them by their almost startling headings. In one of the articles it was stated that in the month of December preceding, the company had reached a condition which was regarded by the directors as one of hopeless bankruptcy.

By themselves these articles would amount to but little, and one of them would rather indicate that Champlin did not know anything about them. In one of them it is stated: "A director, Mr. Champlin, next enters the field as a contestant for honors in this delectable squabble. We know nothing to this gentleman's prejudice, and therefore can not say that his petition to place the company in the bankruptcy court resulted from disappointment, or because he did not share as liberally as more enterprising men did. Be this as it may, he has done so, and thus paved the way for a full disclosure of the affairs of this horribly managed company."

But the author of these articles, a writer on the paper in which they were published, was examined as a witness with regard to them. He tells us that he was in the Customhouse on one occasion, when his attention was called to these proceedings in bankruptcy by Champlin. The first article, he thinks, if not the second, was written at Benner's house, that is, chiefly written there. He wrote in their presence, consulting with them, Benner and Champlin, as to the facts. "They were both present, and when it was all prepared, they revised the copy, read it over, and corrected it, making some changes in it." So that all the public knew of the inside workings of the company was disclosed to the reporter by Champlin and Benner—Champlin, the plaintiff in the bankruptcy proceedings; Benner, the plaintiff in this suit, and both of them stockholders of, and directors in, the company whose affairs, according to them, had been so horribly managed that it was hopelessly insolvent.

And so the conflict waged. Van Norden was pitilessly attacked in

Benner v. Van Norden et al.

the public prints. This was a serious matter, not only as an individual, but because of a position of great trust which he held, viz: President of a savings bank. Besides this, he saw his enormous debt of over \$100,000 figuring on the debit side of a bankrupt company's schedule, and he saw a likelihood of the property which had been transferred to him going into the hands of an assignee in bankruptcy. It seems to be conceded on all hands that in such an event there would have been an end of it all. Just then propositions for negotiating were made to him. Benner held 1620 shares in the stock of the company. The transaction was a simple one. Van Norden was to purchase Benner's stock, and Benner was to see that Champlin's proceedings to force the company into bankruptcy should be dismissed. And so it was done. Van Norden gave him six notes for \$2500 each, payable at various dates, and caused two of them to be discounted, thus paying him in cash \$5000, and giving his notes of \$2500 each for the balance. Benner then bought Champlin's stock for \$4000—about twenty dollars a share—and the suit in the bankrupt court was discontinued. The suit now before us is on one of the \$2500 notes.

In our opinion the evidence in the record shows that from first to last Benner was acting with the sole desire of forcing money out of Van Norden without any pretence of right thereto; that the stock which he made the pretext for his attempt was worthless when he made it, and was only a subterfuge to cover his original determination to get something from Van Norden to which he had no right. In our opinion courts of justice were not made to settle controversies standing on such a basis, and that their doors should be barred to such suits and suitors.

In regard to the defendant Palmer, he was bound only as surety. The principal obligation being declared null, the surety is discharged.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

ON REHEARING.

LUDELING, C. J. The plaintiff sued the defendant, W. Van Norden, as drawer of a promissory note, of which the following is a true copy:

"\$2500.

"New Orleans, June 13, 1874.

"Seven months after date, I promise to pay to the order of myself twenty-five hundred (and 00-100) dollars, value received, with interest at the rate of eight per cent. per annum from maturity until paid."

(Signed)

"W. VAN NORDEN."

Indorsed "W. VAN NORDEN."

The defendant, E. C. Palmer, was sued as guaranteeing the payment of this note at maturity, as per his agreement, found on page 35 of the record.

The following are true copies of the answers of these two defendants :

"And now comes Warner Van Norden, one of the defendants in above entitled cause, and for answer to the petition of plaintiff, denies all and singular the allegations therein contained, except so far as hereinafter specially admitted.

"He admits signing the notes sued on; but specially denies that he is in any wise bound for the payment of the same; and avers that the same was given without any legal or valid consideration, and that the transaction or contract under which said note was given was illegal and reprobated of law, and of no effect.

"Respondent avers that said plaintiff, in combination and conspiracy with one Edward P. Champlin, and others, caused suit to be filed in the District Court of the United States for the District of Louisiana, in the month of May, 1873, numbered 1313 of the docket of said court, entitled 'Edwin P. Champlin v. The Mississippi and Mexican Gulf Ship Canal Company,' a corporation in which this respondent was largely interested; that in said suit the said Champlin, as petitioning creditor, alleged that he 'was a creditor of the said company in the sum of four hundred and sixteen dollars and sixty-six cents, and did pray that said company might be adjudicated a bankrupt.'

"That said Benner and said other persons did openly declare that the purpose of said suit was to extort money from this said respondent; and said suit was, in truth and fact, brought for that purpose.

"That, being largely interested in the affairs of said company, and having large sums of money invested in the business of said company, as all said persons well knew, and being fearful of the proceedings instituted in the United States District Court, and that through the efforts of said Benner and others, the said company would be adjudicated a bankrupt, and respondent thus personally suffer a great loss, he offered to said Benner and said Champlin, and other said persons, to pay the amount of said claim, together with all acts, charges and attorneys' fees, to which they might have been subjected; but his said offer was refused.

"And the said Benner and said other persons did demand and require of respondent, as the sole condition upon which they would discontinue said proceedings in said bankrupt court, the execution by him of six certain promissory notes, in the sum of five hundred dollars each, and their delivery to said Benner; all of which said respondent was compelled to do, and did. Whereupon said proceedings were discontinued.

"He further says that he has paid two of said series of notes, amounting to the sum of five thousand dollars, and that the present suit is upon another of said series of notes.

"Respondent shows further, that at the time of the execution of said notes, the said Benner and others transferred to him certain, say eight hundred, shares of the capital stock of said company; but that the same had no real market value, and has not had since. That the sum heretofore stated, paid by him, far exceeds any real or pretended claim held by said Benner, or said Champlin, or by other persons combining and conspiring with them, or by all of them, against said company, or respondent, and the value of the stock transferred as aforesaid.

"And he says that it is not in equity and good conscience that he is compelled to pay the note sued on.

"Wherefore he prays that plaintiff's suit be dismissed, with costs, and that he have all general relief."

From the admissions in the answer, and from the evidence, it appears that Van Norden was a creditor of the company to a very large amount; that one Champlin, an admitted creditor of the company, had filed a suit in the United States District Court to put the company in bankruptcy, and it is not denied that he had just grounds for his suit; on the contrary, Van Norden states in his petition that he was "fearful of the proceedings instituted in the United States District Court, and that, through the efforts of said Benner and others, the said company would be adjudicated a bankrupt, and respondent thus personally suffer a great loss." He made propositions to compromise the suit, which resulted in the dismissal of the suit, and the sale of eight hundred shares of stock of the company to Van Norden for the price for which he executed his notes. It seems to us the consideration of the notes was good. The motives which influence a person to exercise a legal right do not destroy that right, or affect its enforcement. It would be against good conscience to permit the defendant to refuse to execute his obligation after having had the suit dismissed and received the stocks.

Article 1856 C. C. declares: "If the violence used be only legal constraint, or the threats of doing that which the party using them has a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of measures authorized by law and by the circumstances of the case are of this description."

Mr. Justice Story, in his work on Promissory Notes, says a valuable consideration "may, in general terms, be said to consist either in some right, interest, profit or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side. And if either of these exist, it will

furnish a sufficient valuable consideration to sustain the making or indorsing a promissory note in favor of the payee or other holder." Section 186.

But the defendant says the stock had no value. The plaintiff's answer to this is, that if the fact be as stated by the defendant, it was because the defendant had a hold upon the vitals of the corporation, and was himself absorbing its entire substance. But be this as it may, whether the stock had a market value or not, the existence of the stock is not denied. "He who sells a credit or an incorporeal right, warrants its existence at the time of the transfer," etc. C. C. 2646. "The seller does not warrant the solvency of the debtor unless he has agreed so to do," C. C. 2694. There is no lesion in such sales, and the defendant can not get relief.

It is therefore ordered that our former opinion and decree be set aside, and that the judgment of the lower court be affirmed with costs of appeal.

Mr. Justice MORGAN adheres to the decision first rendered in this case.

5619.

THE STATE OF LOUISIANA v. JACOB MORRIS.

The prisoner was charged with having forcibly entered a certain house in the night time, armed with a dangerous weapon, with the intent to kill. He was found guilty of everything he was charged with, except that he was not armed with a dangerous weapon. The verdict is therefore responsive to the indictment, and a valid sentence could be rendered thereon. The two sections of the Revised Statutes, 850 and 851, form but one law.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.* Criminal case. *A. E. Read*, district attorney, for the State, appellee. *Knickerbocker & Stafford*, for defendant and appellant.

MORGAN, J. The indictment charges that Jake Morris, late of the parish of East Baton Rouge, on the tenth day of October, 1874, did, with intent to kill, in the night time, break and enter the dwelling house of Charles Coleman, he, the said Morris, being at the time of such breaking and entering armed with a dangerous weapon, and the said Charles Coleman and Mrs. Hubbert being lawfully in said house, contrary to the forms of the statutes of the State of Louisiana, etc.

The verdict was: "Guilty of entering the dwelling of Charles Coleman as charged, but without dangerous weapons."

The defendant moved an arrest of judgment, for the reason that the

verdict of the jury is not responsive to the allegations of the indictment, and no valid sentence could be rendered thereon.

Section 850 of the Revised Statutes provides that "Whoever, with intent to kill, rob, steal, commit rape, or any other crime, shall, in the night time, break a dwelling house, and any person being lawfully therein, and such offender being at the time of such breaking or entering armed with a dangerous weapon, or arming himself in such house with a dangerous weapon, or committing an actual assault upon any person lawfully being in such house * * * * on conviction shall suffer death."

Section 851 is, in terms, the same as section 850, except that it provides that, if the person breaking into the house is not armed with a dangerous weapon, or without committing an assault upon any person lawfully being in such house, he shall, on conviction, be imprisoned at hard labor not exceeding fourteen years.

The prisoner was charged with having forcibly entered the house in question, in the night time, armed with a dangerous weapon, with the intent to kill. He was found guilty of everything he was charged with except that he was not armed with a dangerous weapon. The verdict is, therefore, responsive to the indictment. The two sections of the statute form but one law. Under a charge of forcibly breaking into a dwelling, armed with a dangerous weapon, with the intent to kill, he has been found guilty of having forcibly entered the house in question without being armed with a dangerous weapon. Instead of suffering death, he will be sentenced to imprisonment.

He moved for a new trial on the ground of newly discovered evidence. His allegations are that he will prove that the door of the dwelling was not fastened, and that certain witnesses who testified against him had perjured themselves. On this ground the motion was properly denied. If such a state of facts existed he must have known them before, and during the progress of the trial.

He claims a new trial because the judge, he says, charged the jury upon the facts, which he is prohibited from doing. The charge complained of is as follows:

"The prisoner and the citizen whose premises are charged to have been entered in the night time in question are colored men. You are called upon to say, by your verdict, whether the cabin is as much a castle as the dwelling of the most imposing pretensions. If you find persons in the house of Coleman on the night in question, with the assent of the owner, Coleman, they were lawfully there within the meaning of the act. If you find Sylvia and William Hubbert there in bed or out of bed on the night in question, with the consent, expressed or implied, of Coleman, they, too, are lawfully there within the mean-

ing of the act. If the accused broke into the house, as alleged, for the purpose of assaulting William Hubbert with a dangerous weapon, even though you should be satisfied the accused and Sylvia had lived together under the bond of matrimony or not, even though he saw Sylvia in the embrace of the amorous Hubbert, then the accused is guilty as charged." See R. pp. 10 and 11.

We do not see in this any charge as to what the facts were. The law is correctly stated by the judge.

Judgment affirmed.

No. 5743.

FRANK F. CASE, Receiver, v. H. W. KLOPPENBURG et al. SAME v. WILLIAM SCHNEIDER. . (Consolidated).

The right of the lessor to detain the movables subject to his privilege until the rent is paid, is not incompatible with the right of an ordinary creditor to enforce his rights against the same property without depriving the lessor of any portion of his debt for rent. The payment spoken of in article 3218 of the Civil Code does not necessarily mean payment of the lessor's debt by the adverse creditor before the latter is permitted to proceed against the property. The creditor seeking to enforce his claim, as in this case, might be unable to advance the amount of the lessor's debt for rent, and thus by his poverty be debarred from pursuing a legal right, which, if enforced, would realize money sufficient to pay the lessor in full and leave a surplus for himself.

The lessor can not prevent a sale of the lessor's property, on the pretense that it would not bring the amount of his debt. No right of his is violated by a sale made in the exercise of a legal right of another against the property. If the lessor's right is preserved, if his debt is paid in whole or in part only, in case the entire proceeds of the property subject to his privilege are insufficient to pay it all, he has no just ground to complain. His rights can only be exercised concurrently with the right of others on the same property.

The assumption on the part of the lessor of the right of detention of the lessee's property continuously, unless his entire privileged debt is paid, would put the rights of others in abeyance and destroy that condition of equality before the law which all are entitled to occupy in asserting their rights in the courts of the country.

Nothing is better settled in our jurisprudence than that a creditor who has a mere right of preference on the proceeds of property seized under execution has not the legal right to arrest the sale of the property, but is given the right to interpose his opposition and claim the proceeds under a distribution to be made according to law.

The injunction prayed for in this case was illegally issued. The remedy of the lessor was by third opposition, claiming her priority of privilege on the proceeds of the property seized and subject to her privilege.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. J. D. Rouse*, for plaintiff and appellant. *Alfred Philips*, for opponent and appellee.

TALIAFERRO, J. The plaintiff having a judgment against Kloppenburg and Schneider *in solido* and another against Schneider alone, caused executions to issue, and proceeded to seize the entire contents of a barroom or drinking saloon kept by Schneider at the corner of Gravier and Baronne streets. Mrs. Lenes, claiming to be the owner

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of the building in which this saloon is kept, and alleging that she leased the ground floor of the same to Schneider for the purpose of keeping a coffeehouse, filed a petition of opposition to the plaintiff's seizure, on the ground that she has by law the lessor's privilege upon all the effects of her lessee thus seized, and that she has also by law the right of pledge on the same; that the seizures made by the plaintiff are violative of her said rights, and are wrongful and injurious, and will inflict upon her irreparable loss and injury. She prayed that the plaintiff be restrained by injunction from proceeding with the said seizure, and that she recover from the plaintiff two hundred and fifty dollars as special damages for attorney's fees, reserving her right of action against the said parties for the recovery of all damages, loss or injury she may hereafter sustain from the illegal acts and proceedings of the plaintiff in the premises. The plaintiff filed an exception to the opponent's right to an injunction, and took a rule upon her to have it dissolved. Judgment was rendered in favor of the opponent perpetuating the injunction, releasing the seizure, and awarding the opponent one hundred dollars special damages as attorney's fees. From this judgment the plaintiff has appealed. The plaintiff let the premises to Schneider by written lease for the term of five years and four months, to be computed from the tenth of May, 1870, at the rate of \$425 per month, for which in the usual manner of such contracts sixty-four notes were executed and delivered to the lessor for the monthly rent of the property. We understand the position of the opponent to be, that she maintains the right to keep in her possession the effects in controversy, without molestation as a subsisting pledge for the payment of her rent, and that the property so subject to her privilege can not be legally removed from the premises, or in any manner disposed of before her demand for rent is paid. This right is claimed under several articles of the Civil Code, and especially under articles 2705 and 3218. Article 2705 declares that "the lessor has for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased. Article 3218 provides that "the right which the lessor has over the products of the estate, and on the movables which are found on the place leased for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor on the contrary may take the effects themselves and retain them until he is paid." The opponent's right, it is held, is sustained by the jurisprudence of the State, and we are referred to the case of *James Robb v. William F. Wagner*, 5 An. 111, and to *Arick v. Walsh &*

Boisseau et al. 23 An. 605. The expressions used in the two articles of the Code make it that the lessor's rights are secured by more than a privilege, and we must interpret these articles so as to protect the lessor's right fully over the movable effects subject to his privilege in order that such effects may be wholly and entirely subjected to the payment of the lessor's rent to the exclusion of every inferior privilege. But there are higher privileges than those of the lessor. Take for example the privilege of the laborer on the crop grown on the plantation of the lessor cultivated by a lessee who owes his landlord rent for it. To the laborer who produces the crop the law accords the first privilege on the crop. Shall we say that the lessor may detain the products of the plantation until the laborer pays him the sum his lessee owes him for rent before he can enforce his first privilege upon those products? In such a case we apprehend the proceeds of those products would have to be distributed according to law if they were insufficient to pay both privileges. If they sufficed to pay only the laborer's privilege the lessor would receive nothing. So also article 3256 Civil Code subordinates the lessor's privilege to the charges for selling the movables subject to it. Why should not the same rule hold as between the lessor and those having inferior rights? If the proceeds of the movables subject to the lessor's privilege sufficed to pay the lessor, leaving no surplus, the lessor would take it all, and claims of a lower grade would go unpaid. If there were a surplus remaining over and above the amount owing to the lessor, he would have no right to this surplus, and it would go to the creditor holding the next rank. In the interpretation of laws it is the duty of courts to give them that due force and effect that all who are governed by them may receive the benefit and protection they are entitled to under them.

It is a trite maxim that the property of a debtor is the common pledge of his creditors; by which we understand that every creditor has the right to look to the property of his debtor for the payment of his debt. Where the law creates privileges in favor of certain creditors on the property of the common debtor, it leaves to the creditors not preferred their residuary rights whatever they may be against the property of the debtor, notwithstanding the privileges imposed upon it, and they may exercise those rights subsidiarily to those enjoyed by the preferred creditors; and the reason of this right is obvious, for the value of the property may exceed in amount the debt of the privileged creditor and leave something for the ordinary creditor. It seems to us that the interpretation of the articles of the Code referred to, contended for in behalf of the opponent tends to ignore this well settled principle which accords to all creditors the equal right to pursue the property of the common debtor. The terms used in article 3218 of the

Civil Code require a more liberal construction than the one offered in defense of the opponent's claim. The right of the lessor to detain the movables subject to his privilege until his rent is paid is not incompatible with the right of an ordinary creditor to enforce his rights against the same property without depriving the lessor of any portion of his debt for rent. The payment spoken of in that article does not necessarily mean payment of the lessor's debt by the adverse creditor before the latter is permitted to proceed against the property. There are weighty objections to such an interpretation. The value of the property could not well be ascertained except by a sale of it. It might pay only a part of the lessor's debt, it might pay all of it, or it might pay more than all of it. Again, the creditor seeking to enforce his claim (in this case the plaintiff is a judgment creditor) might be unable to advance the amount of the lessor's debt for rent, and thus by his poverty be debarred from pursuing a legal right which if enforced would realize money sufficient to pay the lessor in full and leave a surplus for himself. But it is argued on the side of the opponent that a seizure of the effects of the lessee subject to the lessor's privilege is an interference with his rights of detention of the property, and if permitted would greatly deteriorate the value of the effects subject to his pledge, because by the use of them in the establishment of the lessee, they would yield a greater revenue and be a subsisting security to the lessor for his rent; whereas, by a sale of them a far less value would be realized. These are considerations that can not be taken into view in determining the legal rights of the parties. The elements for such an estimate are few and simple. The lessee owes the lessor a certain sum of money for rent of a coffeehouse, for which he is entitled to a privilege on all the movable property of the lessee in that establishment, consisting of his outfit, stock in trade, and paraphernalia of every kind used in carrying on the business he is engaged in. The lessor is entitled to the proceeds of that property if sold, to the extent of his debt for rent, if so much is realized by the sale. If a less sum is made he takes it all. He can not prevent a sale of the property on the pretense that it would not bring the amount of his debt. No right of his is violated by a sale made in the exercise of a legal right of another against the property. If the lessor's right is preserved, if his debt is paid in whole or in part only, if the entire proceeds of the property subject to his privilege are insufficient to pay it all, he has no just ground to complain. His rights can only be exercised concurrently with the rights of others on the same property. His assumption of the right of detention of the property continuously unless his entire privileged debt is paid, would put the rights of others in abeyance and destroy that condition of equality before the law that

all are entitled to occupy in asserting their rights in the courts of the country.

The authorities relied upon on the part of the opponent we are not prepared to admit are conclusive. The case in 5 An. 111 is very briefly reported. It seems to consist of an abstract from the judgment rendered in the case by the district judge and adopted as the decree of this court.

The facts of the case are not fully given. At all events the purport of the decision seems to be that, where property on which a landlord has a privilege for rent has been seized on execution at the suit of a third person, the landlord has two remedies, either by way of third opposition or by injunction. The case in 23 An. 605, like the one in 5 An., merely recognizes the right of detention as expressed in the Code. In the case in 23 An. the only question was, whether a lessor who has not recorded his lease has a better right to the proceeds of cotton, mules, etc., on the leased premises sold under execution, than the seizing creditor who has not himself registered his seizure. In the case of Robert Lynn Tanner, Administrator of William B. Pierce's estate, v. Asa Tanner, 6 Rob. 35, the question came up more directly in a contestation between a lessor and an overseer for superiority of privilege on the crop raised on a plantation leased to the defendant. There, as in the case at bar, the lessor asserted his right to be of a higher nature than a mere privilege and claimed to have the right to take the effects themselves on which his lien existed and retain them until he was paid. The court said in that case: "This right of detention which is a part of the lessor's remedy, affords him, to be sure, much greater security; but like the pledgee and the creditor, having only a privilege, he must have the thing subject to his lien sold in the manner provided by law. When this takes place, if a conflict should arise in consequence of adverse claims on the same fund, a distribution of it must be made," etc. We can find no satisfactory reason why the lessor's rights should not be determined and his privileged claim ascertained and settled like those of every other creditor holding privilege or mortgage. We suppose that nothing is better established in our jurisprudence than that a creditor who has a mere right of preference on the proceeds of property seized under execution, has not the legal right to arrest the sale of the property, but is given the right to interpose his opposition and claim the proceeds under a distribution to be made according to law. In the case of Herbert's Heirs v. Babin et al. 6 N. S. 614, Judge Porter said "the plaintiff's right is one of privilege, and as the law requires that property put up at auction by the sheriff shall be sold subject to all the privileges and hypothecations with which it is burdened, their position can not in any respect be altered

by the sale, and consequently they have no authority to prevent it. This property may sell for more than will satisfy the plaintiff's demand, and the defendants have consequently a right, even admitting their adversary's privilege is of a superior nature, to cause the thing subject to it to be sold in order that they may get the overplus." This doctrine was again announced in 7 N. S. 281, and has been repeated in various cases since that time." It was broadly laid down in *Wallace v. Bourg, sheriff*, 14 An. 104, that "the existence of a privilege or mortgage on property will not authorize an injunction to arrest its sale."

In the case of *Glerses v. McHatton*, *ibidem* 560, where the question was whether property seized under execution was held by simulated title or by pledge, the court sustained the seizure and said: "Considered as a pledge of the property, the plaintiff had no right to enjoin its sale under the executions of the defendants. He should in strictness have proceeded by way of third opposition to claim a priority upon its proceeds."

Our conclusion is that the injunction was illegally issued, and that the plaintiff's remedy was by third opposition, claiming her priority of privilege on the proceeds of the property seized and subject to the lessor's privilege.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the injunction be dissolved; that the plaintiff, Josephine Elliot, wife of Joseph Lenes, as principal, and Alfred Phillips, her surety, be condemned to pay *in solido* to the defendant in injunction ten per cent. on the amount of the judgments enjoined as damages, and all costs of suit.

HOWELL, J., *concurring*. I concur in the conclusion of Mr. Justice Taliaferro on the ground that I know of no law that enables a landlord and his tenant to shield the property of the latter from the pursuit of his creditors. When any other creditor than the landlord gets a judgment against a tenant, such creditor can seize the property of the tenant, so far as seizable under any execution, and sell it. Then the landlord may assert his preference on the proceeds for what is due him at the time; but he has no legal power or right to prevent by injunction the seizure and sale of the property subject to his privilege, if he has not by some judicial proceedings or some legal mode taken possession of it.

Article 2709 R. C. C. says: "In the exercise of this right (i. e., his right of pledge), the lessor may seize the objects which are subject to it, before the lessee takes them away, or within fifteen days after they

are taken away, if they continue to be the property of the lessor, and can be identified."

Until he seizes the property as provided by the law, any other creditor with a writ may seize under the general laws on the subject of seizing the property of debtors. All the articles of the Code relating to lease must be construed together.

Mr. Justice MORGAN concurs in this opinion.

LUDELING, C. J., *dissenting*. Mrs. Josephine Lenes leased certain houses to the defendants; during the existence of the lease the plaintiff, a judgment creditor of the lessees, seized the contents of the houses—whereupon the lessor, alleging that the property seized was not sufficient to satisfy her claim for the lease, enjoined the sheriff and plaintiff from taking said property and from selling it. She asserts her right of detention of the property under her right of pledge as lessor. It is contended that notwithstanding the lessor's rights, the plaintiff may seize and sell the property, and that the lessor must assert his right against the proceeds.

If the lessor had only a privilege to secure his rents, the position would be correct. But the Code says: "The right which the lessor has over the product of the estate, and on the movables which are found on the place leased, is of a higher nature than a mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves. The lessor, on the contrary, may take the effects themselves, and detain them until he is paid." 3218.

In *Robb v. Wagner*, 5 An. 111, it was decided that a lessor had "a lien and right of detention upon the property on the premises for the security of his rent. The lien was his property, and as valuable to him as if he were the owner of the property itself; and no sheriff or marshal, under execution against a third person, had any right to take away the property before paying the landlord." The same principle was recognized in *Arick & Walsh v. Boisseau*, 23 An. 605.

The case of *Tanner v. Succession of Pearce* is not in point. The organ of the court in that case said: "The only question which this case presents for our solution is, whether the lessor or the overseer has the superior privilege on the crop of a plantation leased to the defendant." And the court decided that the overseer's privilege was superior. The court, it is true, said afterwards: "The right of detention, which is part of the lessor's remedy, affords him, to be sure, much greater security; but, like the pledgee, and the creditor having only a privilege, he must have the thing subject to the lien sold in the manner

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provided by law. When this takes place, if a conflict should arise in consequence of adverse claims on the same fund, a distribution must be made pursuant to that chapter of the Code which treats of the order in which privileged creditors are to be paid." This is true as to the privilege of the lessor, but what becomes of the greater right given him by the article, the right "to take the effects themselves and detain them until he is paid;" which the court says, in the case of *Tanner v. Succession of Pearce*, "affords him, to be sure, much greater security?" How does it afford him additional security if, to enforce payment of his debt, he must give up this right of detention, which is higher than a privilege, and only assert his privilege on the proceeds of the sale? The language of the Code is plain, and I think the legislators meant what it declares. "The lessor, on the contrary, may take the effects themselves and detain them until he is paid." *Sic scripta est lex*. I therefore dissent in this case.

Mr. Justice WYLY concurs in this dissenting opinion.

Rehearing refused.

No. 4415.

FELIX FORMENTO v. F. J. ROBERT.

Under the circumstances of the case, a mere clerical error, such as Joseph N. Robert for F. J. Robert, in the decree of the court from which an appeal is taken, can be corrected by this court in revising the judgment. The defendant, who raises the objection, is estopped by his judicial admissions from denying that he is the party condemned at the trial below.

The false statement by defendant in the act of sale to the plaintiff of a certain piece of property, that said defendant, as universal legatee, had the capacity to purchase the property adjudicated to him at the succession sale of Polly Vassant, led the plaintiff into error in regard to the material part of the contract to his prejudice, and this assertion was an artifice whereby the defendant succeeded in effecting the sale, which therefore is void, because the pretended adjudication to defendant was an absolute nullity, and his sale of the property to plaintiff was the sale of a thing belonging to another.

The doctrine that the purchaser who has paid the price, and who has not been disturbed in his possession, can not demand the restitution of the price, is applicable only to a valid contract of sale. It has no application to a contract void for want of consent, and entered into in error produced by the fraud of the opposite party.

The parol evidence adduced by plaintiff to prove that the price paid by him was thirty-three hundred dollars instead of twenty-three hundred, as stated in the authentic act of sale, was properly excepted to by defendant.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Albert Voorhies*, for plaintiff and appellee. *Gustavus Schmidt, Dalton & Walker*, for defendant and appellant.

WYLY, J. The plaintiff sued to annul a contract of sale for fraud, and to recover \$3300, the price paid by him.

Instead of praying for the citation of François J. Robert, the ven-

dor, as appears by the contract made part of the petition, he prayed that Joseph N. Robert be cited.

The citation addressed to Joseph N. Robert was served on François J. Robert, who was the party intended to be proceeded against. François J. Robert appeared and filed the following exception :

"Fifth District Court, parish of Orleans. Felix Formento v. François J. Robert. The exception of the defendant in this suit respectfully shows: That even supposing all the facts and allegations of plaintiff's petition to be true, the contrary of which he reserves to himself the right of proving in due time, should it become necessary, it is apparent that plaintiff has no cause of action, inasmuch as he does not and can not justly contend that he has been disturbed in the possession of the property bought of this defendant."

Subsequently he filed the following answer :

"Felix Formento v. F. J. Robert. The defendant in this suit comes into court by his undersigned counsel, and reserving to himself the benefit of his exception, and all other legal exceptions, for answer to plaintiff's petition, says :

"*First*—That he denies all the allegations in said petition contained, and not herein admitted.

"*Second*—He denies that plaintiff has set forth any legal or sufficient cause for the rescinding of the sale made to him by the respondent, and that he has any right of action against him. Wherefore he prays that plaintiff's petition be dismissed, and for general relief."

At the trial François J. Robert appeared by counsel, adduced testimony in his own behalf, cross-examined plaintiff's witnesses, took a bill of exceptions, argued and submitted the case to the court. The court gave judgment for plaintiff, after stating the title of the suit correctly, but in the decree, evidently by mistake, condemned Joseph N. Robert instead of François J. Robert. Joseph N. Robert was not before the court and had not gone into the trial.

François J. Robert took a rule for a new trial on grounds appertaining to the defense set up by him, suggesting no mistake in the name of the defendant mentioned in the decree. He appeared by counsel at the trial of the rule, which was discharged.

He then filed a petition for an appeal, beginning in these words :

"Felix Formento v. F. J. Robert. The petition of F. J. Robert, the defendant in the above suit, respectfully represents there is error to his prejudice," etc. And in the appeal bond, after setting out the title of the suit correctly, and after setting out the obligation of the principal and surety, there is the following clause: "Whereas, the above bound F. J. Robert, has this day filed a petition of appeal from a final judgment rendered against him in the suit of Felix Formento, No. 3311," etc.

Fermento v. Robert.

From the foregoing it is manifest that François J. Robert was the defendant in the suit, and was the party condemned by the court, notwithstanding the decree mentions Joseph N. Robert as the defendant. This was a mere clerical error in drawing up the decree, and can be corrected by this court in revising the judgment. The defendant, who now raises the objection, is estopped by his judicial admissions from denying that he is the party condemned at the trial below.

Plaintiff alleges that in 1869 he bought from the defendant a house and lot on Dauphine street, as per act of sale passed before C. V. Foulon, notary public; that in said act the said Robert falsely represented himself as the owner of said property, as the universal legatee of Polly Vassant, deceased, of whose succession he was testamentary executor, and at whose succession sale he became the adjudicatee of said property; that petitioner was not aware of the fact that said Robert was not the universal legatee of said Polly Vassant, and by the false and fraudulent representations of said Robert, he was induced to believe that the adjudication aforesaid was legal and binding, as in his capacity of testamentary executor the said Robert could not become the adjudicatee unless he were really universal legatee, as he represented himself in said act of sale; that said adjudication to said Robert was an absolute nullity, as he was disqualified from buying property under his own administration, he not being universal legatee; that when said Robert sold the property to petitioner, he knew the adjudication to himself was null and void; but in order to induce petitioner to make said purchase, and in order to conceal from him the defect fatal to his own title, he deliberately represented himself as the universal legatee of said Polly Vassant; that petitioner was kept in ignorance of said fraud practiced on him until about three months before bringing this suit, when he was negotiating a sale of the property, and it was discovered that he had no title because the adjudication to said Robert was void, he not being universal legatee of said Polly Vassant, as he had falsely stated. Petitioner claims \$3300, the price of said property, alleging that one thousand dollars thereof were paid in cash in the presence of S. Schonfelt, but not stated in said act of sale.

The material allegations of plaintiff are established by the evidence. There is no doubt that the declaration in the act that the defendant was the universal legatee of Polly Vassant, induced the plaintiff to consent to the sale, and said assertion was false to the knowledge of the defendant, the vendor. He was not the universal legatee, and he was incapable of acquiring, by an adjudication, the property of the succession of Polly Vassant, under his administration as testamentary executor.

The contract is void for the want of consent resulting from a free

and deliberate exercise of the will—the consent given by plaintiff having been produced or induced by the fraud of the defendant. Revised Code, article 1819.

The false statement in the act of defendant's capacity to acquire the property adjudicated to him at the succession sale of Polly Vassant, led the plaintiff into error in regard to a material part of the contract to his prejudice, and this assertion was an artifice whereby the defendant succeeded in effecting the sale to plaintiff. Revised Code, 1847.

The property really belonged to the succession of Polly Vassant, the pretended adjudication to defendant being an absolute nullity, and the transfer by the latter to plaintiff being null, because it was the sale of a thing belonging to another. Revised Code, 2452.

The defendant, however, contends under article 2560 of the Revised Code, and on the authority of *McCullough v. Weaver*, 14 An. 33, that plaintiff, the purchaser who has paid the price, and who has not been disturbed in his possession, can not demand a restitution of the price. That doctrine is applicable to a valid contract of sale; it has no application to a contract void for want of consent and entered into in error produced by the fraud of the opposite party. Until a purchaser in a valid contract is evicted, he has no cause to demand the restitution of the price. But the purchaser in a fraudulent sale may demand the nullity thereof as soon as he discovers the fraud practiced on him, because no one should be bound in a contract to which his consent was not freely given, but was obtained by artifice or fraud.

The parol evidence adduced by plaintiff to prove that the price paid by him was thirty-three hundred dollars instead of twenty-three hundred dollars, as stated in the authentic act of sale, was properly excepted to by the defendant.

"The authentic act is full proof of the agreement against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." Revised Code, 2236.

"Neither shall parol evidence be admitted against or beyond what is contained in the acts." * * * Revised Code, 2276.

The prescription pleaded has not acquired.

It is therefore ordered that the judgment herein be amended to read as follows: It is ordered that plaintiff, Felix Fermento recover judgment against the defendant, François J. Robert, annulling the act of sale of the twenty-third of March, 1869, from said François J. Robert to plaintiff, passed before C. V. Foulon, notary, and that plaintiff recover of defendant twenty-three hundred dollars, with legal interest thereon from judicial demand, plaintiff paying costs of appeal and defendant paying costs of the court below.

Rehearing refused.

State ex rel. Lubie v. Administrator of Finance, City of New Orleans.

No. 5729.

STATE ex rel. EDWARD LUBIE v. ADMINISTRATOR OF FINANCE, City
of New Orleans.

In precise terms, act No. 33 of the acts of 1874, makes Metropolitan Police warrants receivable for licenses throughout the Metropolitan Police district, and the relator in this instance clearly has the right to pay his license to the city of New Orleans in the warrants tendered by him.

In this statute there is no longer any limitation, as before, upon the receivability of Metropolitan warrants for licenses throughout the Metropolitan Police district, and the court can not decide that there is a limitation where the law has imposed none.

That New Orleans received in settlement of taxes and licenses due her prior to the enactment of the statute of 1874, more than the aggregate amount of her apportionment, is immaterial to the issue in this case. If she received more than the law required her to receive and suffers an inconvenience on account thereof, it is the result of her voluntary act.

Like every other holder of Metropolitan Police warrants, she can present the excess beyond the *pro rata* apportioned to her, to the Metropolitan Police Commissioners for payment out of the money collected from the other cities, towns and parishes composing the Metropolitan Police district.

There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses, because that was virtually a consent judgment, and the rule is, such judgments are binding only on the parties.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Hornor & Benedict*, for plaintiff and appellant. *B. F. Jonas*, city attorney, for defendant and appellee.

WYLY, J. The relator, who was owing the city of New Orleans \$750 for his license to carry on the business of Pawn Broker for the year 1875, tendered in payment certain Metropolitan Police warrants issued for the fiscal years 1873 and 1874; the tender was refused, and the relator applied for a mandamus to compel the Administrator of Finance of said city to receive said warrants in payment of said license.

The court granted a rule *nisi*, and at the trial thereof refused the mandamus. From this judgment the plaintiff appeals.

Act No. 44 of the statutes of 1869, provides that all warrants issued in payment of the salaries of officers, employes and members of the Metropolitan Police under act of fourteenth of September, 1868, the act establishing the Metropolitan Police, shall be receivable for all parish and municipal taxes and licenses in the parish of Orleans, Jefferson and St. Bernard, and the cities of New Orleans, Jefferson and Carrollton; "provided that the aggregate of said warrants so received in each current year, shall not exceed the amount of the apportionment made by the Board of Metropolitan Police Commissioners, upon such city or parish for that year." The act also provides a penalty against any parish or municipal officer for refusing to receive such warrants for taxes as therein provided.

Act 41 of the acts of 1870, provides that all warrants, checks or orders, issued by the Secretary and approved by the president of the Board of Police Commissioners in payment of the salaries of the officers, employes and members of the Metropolitan Police, and all warrants issued or that may hereafter be issued, signed and approved as aforesaid, "shall be and they are hereby made receivable for all parish and municipal licenses, taxes and debts due, or to become due, to the parishes of Orleans, Jefferson, St. Bernard, and the cities New Orleans, Jefferson and Carrollton; provided that the aggregate of said warrants, checks, or orders so received in each current year shall not exceed the amount of the apportionment made by the Metropolitan Police Commissioners upon said parish or city for that year."

The act also provides a penalty against any parish or municipal officer for refusing to receive said warrants, checks or orders as provided in payment of taxes and licenses.

The warrants tendered by the relator were issued under this statute and were drawn for expenses incurred during the fiscal years 1873 and 1874. And on them is indorsed: "This warrant is receivable for all licenses, taxes and debts due and to become due to the parishes of Orleans, Jefferson and St. Bernard, and the cities of New Orleans and Carrollton, up to the amount of the apportionment assessed by the Board of Metropolitan Police Commissioners against said parishes or cities respectively on sixteenth October, 1872, for the fiscal year ending September 30, 1873."

Although New Orleans had taken up in settling with her taxpayers warrants largely in excess of the apportionment assessed to her during the years 1869, 1870, 1871 and 1872, and warrants she could not have been compelled to receive because in excess of the apportionment for those years, she did not take up warrants aggregating the apportionment assessed to her by the Metropolitan Police Commissioners for the fiscal years 1873 and 1874. Under the act of 1870 the city could have been compelled to receive the warrants in question, evidencing the police expenditures for said years, because, during that period she had not taken up warrants to the amount of the apportionment, however largely in excess of apportionment she had taken up warrants during previous years.

The law in force at the time made these warrants receivable for all licenses, taxes and debts due to each of the parishes and cities in the Metropolitan Police district; "provided that the aggregate of warrants, checks or orders so received in each current year shall not exceed the amount of the apportionment made by the Metropolitan Police Commissioners upon said parish or city for that year."

The law, however, has been changed. In 1874 the General Assem-

bly passed act No. 33, which requires each of the cities and parishes composing the Metropolitan Police district to levy and collect a special tax, as estimated and apportioned by the Metropolitan Police Commissioners, for the support of the Metropolitan Police force for the year in which said estimate and apportionment is made. The act also provides: "that in the tax levied for Metropolitan Police purposes payment shall be made and received in lawful money of the United States only, and it shall be unlawful to receive in payment of said tax any warrants or evidence of indebtedness of any kind whatever; provided that Metropolitan Police warrants issued by the Board of Police Commissioners for the payment of salaries and expenses of the police department incurred prior to the year 1874, shall be receivable in full for all taxes due the cities of New Orleans and Carrollton, and the town of Kennerly and the parishes of Jefferson and St. Bernard prior to the first day of January, 1874, except tax for interest on the bonded debt, the public school tax and city park tax, and for all licenses and debts other than taxes due the said cities, towns and parishes composing the Metropolitan Police district, due or to become due as provided by existing laws, until the said outstanding Metropolitan Police warrants shall all be absorbed, and that the warrants so received shall be credited to the several cities, towns and parishes composing the Metropolitan Police district pro rata against the apportionments made by the board of police commissioners for the fiscal years prior and up to January 1, 1874, after which they shall be turned over to the treasurer of the Board of Police Commissioners to be by him canceled and destroyed under supervision of said board."

This law is unambiguous. It requires a special tax to be levied and collected in cash throughout the Metropolitan Police district to support the Metropolitan Police department. It makes the outstanding police warrants receivable for taxes due the cities towns and parishes composing the Metropolitan Police district, prior to the year 1874, except certain special taxes, "and for all licenses and debts other than taxes due the said cities, towns and parishes composing the Metropolitan Police district, due or to become due as provided by existing laws, until the said outstanding Metropolitan Police warrants shall all be absorbed."

* * * * *

In precise terms this statute makes Metropolitan Police warrants receivable for licenses throughout the Metropolitan Police district, and the relator clearly has the right to pay his license to the city of New Orleans in the warrants tendered by him. Prior to the enactment of this law these warrants were receivable for taxes, licenses and debts due to the cities towns and parishes composing the Metropolitan Police district, provided the aggregate of warrants so received in each cur-

rent year shall not exceed the apportionment made by the Metropolitan Police Commissioners upon said parish or city for that year.

In the law before us, however, there is no limitation upon the receivability of Metropolitan Police warrants for licenses throughout the Metropolitan Police district. And the court can not decide that there is a limitation where the law has imposed none.

That New Orleans received in settlement of taxes and licenses due her prior to the enactment of this law, more than the aggregate amount of her apportionment, is a matter quite immaterial to the issue in this case. If she received more than the law required her to receive, and suffers an inconvenience on account thereof, it is the result of her voluntary act. Like every other holder of Metropolitan Police warrants, she can present the excess beyond the pro rata apportioned to her, to the Metropolitan Police Commissioners, for payment out of the money collected from the other cities, towns and parishes composing the Metropolitan Police district. For the years these warrants were issued adequate apportionments were assessed by the Metropolitan Police Commissioners against each of the municipal corporations composing the Metropolitan Police district. If on final settlement with the Metropolitan Police Commissioners it shall appear that certain municipal corporations of the district have taken up all the warrants, and others in lieu of warrants have paid in the cash, those holding warrants in excess of apportionment can demand and receive the money. In receiving warrants, as New Orleans has heretofore, beyond the requirements of the law, an inconvenience may result, but none of the disastrous consequences or losses suggested by the learned counsel for the city can befall the municipal corporation of New Orleans. There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses; because as we have seen, that was virtually a consent judgment, and the rule is such judgments are binding only on the parties.

After virtually consenting to the injunction, the respondent and the city of New Orleans ought not to be allowed to set it up as a plea for a palpable dereliction of duty to the injury of third parties.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that the mandamus be made peremptory, respondent paying costs of both courts.

Rehearing refused.

State ex rel. Van Norden v. The Mayor and Administrators of the City of New Orleans.

No. 5735.

STATE OF LOUISIANA ex rel. WARNER VAN NORDEN v. THE MAYOR
AND ADMINISTRATORS of the City of New Orleans.

According to the provisions of the several statutes of the Legislature creating and regulating the duties of the drainage commissioners for the city of New Orleans, to whose rights and duties the respondents have succeeded, it is the ministerial duty of the respondents to collect the assessments and judgments for drainage taxes, in time to meet the payment of the warrants to be issued to the Mississippi and Mexican Gulf Ship Canal Company, by the Administrator of Accounts for work done by said company, and a mandamus will lie to compel the performance of this duty.

As to the objection that the relator could not acquire, and the Mississippi and Mexican Gulf Ship Canal Company could not assign their franchisees to him, it is one which the respondents are without interest to raise. The transfer, whether in pledge or in full property made to him by said company, has been recognized by the Legislature in act 22 of the acts of 1874, proposing an amendment to the constitution limiting the debt of the city of New Orleans, and it is now a part of the organic law of the State. After such a transfer, thus recognized by the State, the respondents can certainly raise no objection to said transfer.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Lacey & Butler, Wm. H. Hunt, Rice & Whitaker, Alfred Shaw*, for relator and appellee. *B. F. Jonas*, city attorney, *Samuel P. Blanc*, assistant city attorney, for respondents and appellants.

WYLY, J. This is a mandamus proceeding to compel respondents to collect the drainage taxes for the first, second, third and fourth drainage districts of the city of New Orleans, and to compel them to issue writs of *fieri facias* on the judgments rendered on the homologation of the tableau of assessments, or the assessment rolls of each and all of the aforementioned districts, as required by act 30 of acts of 1871, and previous acts in regard to the drainage of the city of New Orleans.

The court granted a rule *nisi*, and at the trial made the mandamus peremptory, so far as to require the respondents to issue writs of *fieri facias* and collect, as provided by law, cash sufficient to pay for the work now done under act 30 of the acts of 1871, to wit: the sum of \$78,358. From this judgment the respondents have appealed.

The preamble of act 30 of the acts of 1871, entitled "An Act to provide for the drainage of New Orleans," is the following:

"Whereas, the proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also to the State of Louisiana; and, whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion; therefore be it enacted," etc.

Sections one, two, three, four and five authorize and empower the Mississippi and Mexican Gulf Ship Canal Company to build certain protection levees and to make certain canals required for the drainage of New Orleans.

Section six makes it the duty of the board of administrators, immediately after the passage of this act, to cause the lines of the protection levees and the canals specified in the various sections of this act to be located, and requires said board to build and run all pumps and draining machines necessary to lift the drainage water from said canals over into Lake Pontchartrain, and to keep the water in the canals in process of excavation at the proper level for the work of excavation.

Section seven provides "that said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand cubic yards per month, and to move the same the distance required to build the protection levees, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month."

Section eight provides "that at the end of every month the city surveyor shall examine the work done by said company during said month, and, upon measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, shall certify the number of cubic yards excavated and the number of cubic yards of protection levees built during said month; and on presentation of said certificate to the administrator of accounts he shall draw a warrant or warrants on the administrator of finance at fifty cents per cubic yard in payment of the work done. These warrants it shall be the duty of the administrator of finance to pay on presentation to him."

By section nine it was enacted "that, in order to provide funds for the payment of the work to be done by the said company the three boards of draining commissioners for the drainage districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the board of administrators of New Orleans all moneys, assessments, and claims of drainage, in their hands, or under their control, all titles to real estate, all books, plans, tableaux, judgment in favor of commissioners, the office furniture of said commissioners, a true statement of the claims of said commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said drainage districts: * * * Provided, that all money or moneys received by the board of administrators from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied

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only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the 'payment of said Mississippi and Mexican Gulf Ship Canal Company.'" * * * By this same section it is further provided: "That the board of administrators be and they are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under acts of March 18, 1858, March 17, 1859, and the several supplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible at such time and in such manner as the board of administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under and created by acts of March 18, 1858, and March 17, 1859, and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act where no assessments have been made; and to execute and enforce the same, as provided for by the several acts of the Legislature creating and regulating said board of draining commissioners." * * *

Considering the provisions of this statute and the acts of the Legislature creating and regulating the duties of the drainage commissioners, to whose rights and duties the respondents have succeeded, we are of opinion that it is the ministerial duty of the respondents to collect the assessments and judgments for drainage taxes in time to meet the payment of the warrants to be issued to the Mississippi and Mexican Gulf Ship Canal Company by the Administrator of Accounts for work done by said company; and that a mandamus will lie to compel the performance of this duty. We think the court did not err in making the mandamus peremptory so far as to require the respondents to issue writs of *fiery facias* on the judgments for drainage assessments, and to collect an amount sufficient to pay relator for the warrants issued by the Administrator of Accounts, and for the work now done under act 30 of the acts of 1871. As to the objection that the relator could not acquire, and the Mississippi and Mexican Gulf Ship Canal Company could not assign their franchises to him, we will remark that it is an objection the respondents are without interest to raise. The transfer, whether in pledge or in full property, made to him by said company, has been recognized by the Legislature in act 22 of the acts of 1874, proposing an amendment to the constitution, limiting the debt of the city of New Orleans, and it is now a part of the organic law of this

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State. After the transfer has thus been recognized by the State, the respondents can certainly raise no objection to it. They must perform their ministerial duties, and the relator, as the transferee in pledge of the franchises of the Mississippi and Mexican Gulf Ship Canal Company, can compel them by mandamus to do so.

Judgment affirmed.

Mr. JUSTICE MORGAN took no part in this decision.

HOWELL, J., *dissenting* There is no provision of the law, in my opinion, which makes it the ministerial duty of the Mayor and Administrators of New Orleans to issue writs of *feri facias* or cause them to be issued. The act of 1871, so far as it refers to this subject (sec. 9), enacts "that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance on assessments, as shown by the books of the first, second and third drainage districts, under acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under and created by the acts of March 18, 1858, and of March 17, 1859, and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same, as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners;" and provided further, that all the money received by the said board from all the sources contemplated by this act shall be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund solely for the drainage of New Orleans and Carrollton, and all property, not money, so received, shall be held in trust for the payment of the said company and ultimately for the benefit of New Orleans, if not needed for drainage.

A reference to the other laws mentioned shows that a discretion was conferred on the several boards of commissioners, just as is conferred on the Board of Administrators by this act of 1871. It is made their duty, certainly, to execute and enforce the several assessments; but as provided for by the law and at such time and in such manner as they may designate, the time to be so as to pay the warrants to be issued by the company. They are also empowered in certain contin-

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gencies to purchase the property sold for the said assessments. All these provisions of the law clearly show to my mind that while certain duties are imposed on the Board of Administrators, which they should faithfully perform, they are vested with some discretion as to the manner of discharging those duties. They may find that if executions are issued the property will have to be bought by the city, as they are directed to do in certain cases, in order to bring the amount of the judgment as required by the law, and that would not provide the money to meet the warrants. And when they call upon the clerk of the inferior court to issue the writs of *feri facias* (for they themselves can not do it), that officer may decline for some reason beyond the control of the Board of Administrators, and then the latter would have to be compelled by mandamus to apply for and obtain at all events a mandamus to compel the clerk to issue the required writs of *feri facias*. It is not every duty imposed on a public officer that can be enforced by mandamus. I can not think this is a case for a mandamus, and therefore dissent.

No. 4100.

MAURICE N. BOWMAN et als. v. THE CITY OF NEW ORLEANS.

Where certain parties, whose claims did not exceed five hundred dollars, united with others whose claims exceeded that sum for each one of them and sued the city of New Orleans for several thousand dollars;

Held—That having united in one suit for convenience and economy, and now desiring to sever, they can not thus be permitted to deprive the city of New Orleans of the benefit of an appeal, and that their motion to dismiss can not prevail

If the proprietor below erects a dam or any other thing which obstructs the natural drainage of the estate above, he can be compelled to remove the obstruction and to pay damages sustained on account thereof.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. O. W. Besançon*, for plaintiffs and appellees. *H. H. Walsh*, assistant city attorney, *B. F. Jonas*, city attorney, for defendant and appellant.

ON MOTION TO DISMISS.

KENNARD, J. This case is before us on a motion to dismiss, made by the following parties, plaintiffs, in whose favor judgments were rendered by the court below for various sums, none of which exceeded five hundred dollars, to wit: *Africa Williams, Caesar Small, Lazarus Young, Pennil Small, Joseph Jackson, Charles Small, Spencer Allen, and Harriet Morgan.*

The above named parties united with sundry other plaintiffs whose claims exceeded five hundred dollars each, and sued the city of New

Orleans for several thousand dollars. They united in one suit for their convenience and economy, and now desire to sever, to deprive the city of the benefit of an appeal.

The alleged damage seems to have arisen from one and the same cause, to wit, from the closing up by the city of certain outlets for water in the embankment known as Camp Parapet.

The city is entitled to consider the total amount prayed for in the petition as the amount claimed from her for one alleged unlawful act; this amount largely exceeds five hundred dollars. *Heirs of Ballio v. Prudhomme et al.*, 8 N. S. 338. In the case of the *State ex rel. Murtaugh et als. v. Judge Eighth District Court*, No. 3445 of the docket of this court, lately decided, the reasoning of the court sustains this view.

Motion to dismiss denied.

ON THE MERITS.

WYLY, J. Plaintiffs allege that they are farmers, and their farms are situated above and in the vicinity of a large embankment in the parish of Jefferson, known as Camp Parapet, being a fortification commenced by the Confederate authorities and completed by the Federal troops during the late war; that said embankment runs from the Mississippi river to the high land, known as the Metairie Ridge; that through this embankment were several outlets or openings to allow the water naturally to drain from their places to the lands below; that in April, 1871, the city of New Orleans illegally caused these openings to be closed, obstructing the drainage of their lands and causing the loss of their crops by the overflow of rainwater; that by this unlawful act they have been entirely deprived of drainage to their lands, and they have sustained the losses of which they complain.

They pray for damages, and that the city of New Orleans be compelled to remove said obstructions. There was judgment as prayed for, and the defendant appeals. The evidence shows that the city of New Orleans caused the obstruction to the drainage of plaintiffs' lands, and they sustained the damages of which they complain. The embankment, known as Camp Parapet, is in the parish of Jefferson, and beyond the limits of the city of New Orleans. No authority was given by the police jury of the parish of Jefferson for the closing of the openings in said embankment allowing the rainwater falling on the lands above to flow naturally upon those below.

Article 660 of the Revised Code provides that "it is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not

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been used to create that servitude. The proprietor below is not at liberty to raise any dam, or make any other work, to prevent this running of the water." * * *

If the proprietor below erects such dam or obstructs the natural drainage of the estate above, he can be compelled to remove the obstruction and to pay damages sustained on account thereof. 19 La. 351; Revised Code 2315; 4 An. 440; 12 An. 15.

The city of New Orleans, having authorized the illegal act of her agents, is in no better position than any other person, and is responsible for the losses sustained by the plaintiffs on account thereof.

Judgment affirmed.

No. 4379.

SMITH & McKENNA v. EDWIN CHARLES.

The motion to dismiss the appeal of Glover & Odendahl, on the ground that the court is without jurisdiction because the amount in controversy is below five hundred dollars, must be overruled, the proceedings in the case being considered in the nature of a concursus.

The heir being considered seized of the succession from the moment of its being opened, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession, and each of the heirs becomes an undivided proprietor of the effects of the succession for the part or portion coming to him, which forms among the heirs a community of property as long as it remains undivided, and the recording of a judgment against an heir must be held to affect all mortgageable property thus owned by such heir.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. Magioni and T. Gilmore & Sons*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for C. H. Lawrence & Co., and Glover & Odendahl, appellants. *Charles F. Olaiborne*, for Vose Bros. *J. J. Finney*, for Finney & Byrnes.

ON MOTION TO DISMISS.

TALIAFERRO, J. This motion is made on the ground that the amount in controversy is less than \$500, and that this court is therefore without jurisdiction.

Smith & McKenna sued Charles for \$686 92, and obtained judgment for \$636. Execution was issued and Charles' interest in his father's succession was seized and sold for the sum of \$1750. A rule was taken on the sheriff to show cause why he should not pay over to the plaintiffs the amount of their judgment out of the proceeds, and they made parties to the rule; several other creditors of Charles having judgments against him of record, among them Glover & Odendahl, the appellants, who claimed to be paid in preference to the others on

the ground of priority of record. Their judgment is for \$251, with a small amount of interest.

The judgment on the rule gave precedence to three of the creditors over Glover & Odendahl, decreeing to them and to Lawrence & Co. the remainder pro rata after the first three creditors were paid. From this decree Glover & Odendahl and Lawrence & Co. have appealed. The motion is made to dismiss the appeal of Glover & Odendahl.

We regard these proceedings as in the nature of a concursus, and, therefore, conclude that the appellants have the right to appeal. 3 Rob. 5; 2 An. 189.

It is ordered that the motion to dismiss be overruled.

ON THE MERITS.

HOWELL, J. The material facts of this case are, that Richard Charles died leaving a widow and six children; he made a will, stating his entire estate to be community, gave a special legacy of \$2000 cash to his brother, and bequeathed the balance of his estate, real and personal, in equal shares to his six children, subject to the usufruct in favor of his wife. His estate was inventoried at \$70,043, of which \$62,600 was immovable and \$7443 movable property. The defendant in this suit becoming indebted to different parties, judgments were obtained against him and duly recorded. Executions issued, and all his right, title and interest in and to the succession of his father was sold for \$1750 cash. The question presented and argued by the creditors is, did a judicial mortgage attach to what was thus sold?

According to the doctrine in *Tureaud v. Gex*, 21 An. 253, the mortgage attached to all the mortgageable property, and as the movable property is of insignificant amount compared with the immovable, it seems to have been considered unnecessary to fix the relative proportions of the proceeds.

As said in the case above cited: The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession; and each of the heirs becomes an undivided proprietor of the effects of the succession for the part or portion coming to him, which forms among the heirs a community of property as long as it remains undivided. C. C. 936, 1214; and the recording of a judgment against an heir was held to affect all the mortgageable property thus owned by such heir.

It follows, therefore, that the claims of the contesting creditors of

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the defendant in this suit must be paid in accordance with the rank of their respective mortgages.

It is therefore ordered that the judgment appealed from be reversed, and that the proceeds of the sale herein made by the sheriff and now in his hands, be distributed as follows, to wit: To Glover & Odendahl, \$251 40, with legal interest from second of October, 1871, and costs of suit.

To Vose Brothers, \$519 80, with five per cent. interest per annum thereon from February 17, 1872, until paid, three dollars and sixty cents costs of protest and costs of suit.

To Finney & Byrnes, \$228 84, with legal interest thereon from October 7, 1871, until paid and costs of suit.

To C. H. Lawrence & Co., \$828 76, with eight per cent. interest from thirty-first January, 1872, and costs of suit.

To Smith & McKenna, the balance, if any, after paying the four preceding claims in their order. Costs of appeal to be paid by the plaintiffs, appellees.

Rehearing refused.

No. 4350.

THE NEW ORLEANS CANAL AND BANKING COMPANY et al. v. THE CITY OF NEW ORLEANS.

The motion to dismiss the appeal made by each of the two plaintiffs, on the ground that all the plaintiffs were not made parties to the appeal, can not prevail. There is but one judgment in the case, for which an appeal was granted in open court within ten days after the rendition of the judgment and at the same term of court. No citation was necessary and both plaintiffs were made parties to said appeal, taken by motion. The fact that afterward a petition for an appeal was filed did not affect what was previously done.

Act No. 30 of the acts of 1871, entitled "An Act for the drainage of New Orleans" does not repeal the act of 1858, which provides for leveeing, draining and reclaiming swamps in certain portions of the parishes of Orleans and Jefferson. It only changes, in some degree, the mode by which the drainage is to be accomplished and the means to be applied, but the act itself still stands.

The main reliance of the plaintiffs is, that the lands belonging to them have not been and will not be benefited by the drainage works which are now in progress. But this allegation is not supported by the testimony of the witnesses.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. George L. Bright*, for plaintiff and appellee. *B. F. Jonas*, city attorney, for defendant and appellant.

ON MOTION TO DISMISS.

LUDELING, C. J. A motion to dismiss this appeal is made by each of the two plaintiffs, the bank and George L. Bright, on the grounds that all the plaintiffs are not made parties to the appeal. There is

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only one judgment in the case from which an appeal was granted, in open court, within ten days after the rendition of the judgment, and at the same term of the court. No citation was necessary, and both plaintiffs were made parties to said appeal, taken by motion. The fact that afterward a petition for an appeal was filed, did not affect what had been previously done.

The motion to dismiss is overruled.

ON THE MERITS.

MORGAN, J. In 1858 the Legislature passed an act entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson." Three draining districts were established by this act, the first, second and third.

Plaintiff owns property comprised within the second district, as established by law.

Property situated within the districts was subject to a tax. Plaintiff paid the tax assessed to its property, under a judgment obtained against them, amounting to over \$38,000.

The object of this suit is to recover the amount of that tax. The ground upon which the demand rests is that no portion of their land had been drained up to the year 1871, when the Legislature (act No. 30, 1871, p. 75) excluded them from the drainage district. The act in question is entitled "An Act for the drainage of New Orleans."

We do not see from an examination of this act that it repeals the act of 1858. It changes in some degree the mode by which the drainage is to be accomplished, and the means to be applied thereto, but the act itself still stands.

The main reliance of the plaintiff is, that the lands belonging to the bank have not been, and are not to be, benefited by the drainage works which are now in progress. But the testimony of the witnesses shows that when the canals, etc., now in process of construction will have been completed, plaintiff's lands will be drained. If this be so, and we order the defendant to return the money which has been received, the result would be that plaintiff's land will be drained at others' expense. We do not think that the law authorizes the judgment which was rendered in plaintiff's favor.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

LUDELING, C. J. I concur in the decree.

Rehearing refused.

No. 5521.

NICHOLAS BURTON et als. v. CHARLES HICKS et als.

A motion to dismiss an appeal, to be entertained, must be filed within three judicial days after the return day.

A defect in a certificate would be no cause to dismiss an appeal, the fault being attributable to the officer whose duty it is to make the certificate.

A deputy clerk is an officer known to the law and is authorized to sign certificates.

On the trial in the court *a qua* the defendants severally claimed in vain the right to challenge ten jurors under the act of 1855. If it was ever contemplated that several plaintiffs claiming different offices, could unite to bring one suit against several defendants, it is manifest from the unambiguous language of the law in regard to contested elections, that each defendant would have the right which was claimed and which was refused.

Taking as true what the defendants admitted, to avoid a continuance: "That the election returns of the parish were not made out and sworn to as the law requires, and that the ballots for ward one will not show the same result as to the returns, this would not be sufficient to defeat the parish election. It has been often decided that the failure to comply with the directory clauses of an election law will not annul an election. Courts can not affix to the omission a consequence which the Legislature has not affixed.

There is an essential difference between the act of voting and the police provisions to secure the evidence of the act. If the votes be deposited, the object of the election is attained, and its validity can not be affected by the non-observance of the directory provisions.

If the sworn statements be true, that the ballots and returns, in the ballot boxes which were called for and could not be procured, have been tampered with so as to render them unreliable as evidence, the result of the election as ascertained and announced by the commissioners of election at each precinct, might have been proved by the next best evidence in existence.

The irregularities shown by the evidence to have existed, resulted from a want of information on the part of the officers of the election, and said irregularities do not in any manner affect the result of the election in the parish.

The fact that the ballot box, at one precinct, could not be seen by those voters who stood near the window, can not be a cause to annul the election.

The law does not authorize an election to be set aside, except for fraud, intimidation, violence or corruption, at or before the election, and then only when such fraud, violence, intimidation, etc., had the effect to change the result of the election.

It is not shown that the defendants had any connection with the irregularities committed, or with any acts of fraud, or violence, if any were perpetrated.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J.* Jury trial. *O. H. Farrar* and *Julius Aroni, Montgomery & Delony*, for plaintiffs and appellees. *Leonard & Kennedy, DeFranc & Austin*, for defendants and appellants.

ON MOTION TO DISMISS.

LUDELING, C. J. A motion to dismiss this appeal has been made, on the ground that the certificate to the transcript is signed by the deputy clerk. The motion is refused for the following reasons:

First—Because the motion was not filed within three judicial days after the return day. 17 An. 21; 18 An. 191; 19 An. 276; 20 An. 39; 21 An. 329; 11 An. 545; 7 N. S. 271.

Second—Because a defect in a certificate would be no cause to dismiss an appeal, the fault being attributable to the officer, whose duty it is to make the certificate. Revised Statutes, section 36.

Third—Because a deputy clerk is an officer known to the law, and he is authorized to sign certificates. C. P. 782; 3 An. 247, *Downs v. Tarkington*; 15 La. 33, *Bauk of Louisiana v. Watson*.

ON THE MERITS.

LUDELING, C. J., Seven persons, who were candidates on the same ticket for different offices, to wit: Nicholas Burton for sheriff, M. Dubose for parish judge, and David King, C. E. Shearer, Jackson Snelling, Henry Price, and John Halloway for police jury, instituted this suit against the persons who were candidates for said offices on the other ticket at the election in Carroll parish in November last.

They allege that the election was null and void, "because of the various irregularities and illegalities in the appointment of commissioners to hold the election in the manner of holding it, and frauds committed by the commissioners at the various polling precincts, and the acts of other persons, interested in the election, in violation of the statutes of this State and of the United States, known as the enforcement act, as follows," to wit:

"That the commissioners were not selected from the different political parties, nor were they of good standing; that said commissioners did not take the oath prescribed by law, nor did they examine the ballot boxes before commencing to receive votes; that the election in ward No. 1 was not held at the proper place; that the election in said ward was held in a small room away from the public view of the voters; and a large number of the ballots or votes cast in said ward were not placed in the box in view of the voters, nor taken from their hands by the commissioner receiving the ballots; that the commissioner, Jackson, who received the ballots, was seen to change several ballots placed in his hands, and deposit in the box tickets other than those handed him by the voters; that Cain Sartain, a candidate, cast several different ballots at said election at said precinct; that the tally sheets of the votes cast at said election were not closed and signed by six o'clock the day following the election; that the same were changed after six o'clock on said day and made different from what they were first made up after the election; that neither the tally sheets nor ballot box containing the ballots cast at said precinct have been deposited in the office of the clerk of the district court, although Daniel Jackson, one of the commissioners, is himself clerk of said court."

They further charge irregularities and fraud at the other precincts of the parish, and pray that the election be declared null and void. And they further pray that should the court decide that the election held at wards four and five, was valid, notwithstanding the irregularities and frauds complained of, and that the election was null and void at all the other precincts; that in that event, they be declared elected to the various offices for which they were candidates.

The defendants severally filed exceptions, stating that there was an improper joinder of plaintiffs and defendants; that several different plaintiffs were claiming different things from different defendants, in the same suit. Moss further pleaded that the court was without jurisdiction *ratione materiae* to entertain the suit as to his office, that of parish judge; and the candidates for police jury severally pleaded to the jurisdiction of the court, because the emoluments of the office did not exceed five hundred dollars.

These exceptions were overruled. On the trial, the defendants severally claimed the right to challenge ten jurors under the act of 1855. This was denied them, and they took a bill of exceptions to the ruling. If it was ever contemplated that several plaintiffs claiming different offices could unite to bring one suit against several defendants, it is manifest from the unambiguous language of the law in regard to contested elections, that each defendant would have the right, which was claimed and refused in the district court. Section 1429 of the Revised Statutes, treating of the trial of contested election cases, declares that, "in empanneling the jury each party shall be entitled to ten peremptory challenges."

Another bill of exceptions was taken to the ruling of the judge *quo* refusing to permit the defendants to prove by parol what the actual votes were which were cast at every precinct for each candidate. The circumstances under which the defendants offered the parol proof were as follows. After the trial had commenced, a rule was taken on the clerk of the court to produce the ballot boxes and tally sheets, which section 13 of the act of 1873 directs shall be delivered to the clerk. The clerk answered that they were not in his possession, but in the possession of R. R. Anderson, his deputy.

A rule was then taken against Anderson, but the coroner's returns show that he could not be found in the parish, and that he had gone to New Orleans. Thereupon the plaintiffs applied for a continuance. In their application for a continuance they swore that they expected to prove by the production of said ballot boxes that the ballots and returns had been so tampered with that no election can be declared in said parish. They subsequently made another affidavit, in which they state that they expect to prove "by the ballot boxes and returns * * were not made out and sworn to as the law requires; and they will not show the same result as the ballots in the boxes."

To avoid a continuance, the defendants admitted that "the returns made out for the last election in this parish were not made out and sworn to as the law requires, and the ballots in the boxes for ward No. 1 will not show the same result as the returns."

It seems to us that if the statements in the affidavits be true that

the ballots and returns in the ballot boxes called for have been tampered with so as to render them unreliable as evidence, the result of the election as ascertained and announced by the commissioners of election at each precinct might have been proved by the next best evidence in existence.

The defendants are not charged with the irregularities or frauds complained of in conducting the election; nor are they charged with having said boxes, nor with tampering with them. Under the circumstances, there are no presumptions against the defendants, and they had the same right that plaintiffs had to introduce the best evidence, which the nature of the case admitted of. But we do not perceive that the refusal of the judge injured the defendants, as the onus of proving that the election was null and void, or that they were elected, was upon the plaintiffs, and they have introduced no evidence to establish fraud, illegality or irregularity at the election, except as to ward No. 1 and ward No. 2, besides the admissions of defendants made as above stated. But they do not allege or attempt to prove that if the entire vote of wards two and one were thrown out they would be elected. They only claim that this result would be attained if all the wards in the parish, except wards Nos. 4 and 5, were rejected; thereby admitting that they were not elected.

As already stated, the only evidence offered by the plaintiff was the admissions aforesaid, and the testimony of witnesses as to what occurred in relation to the election at wards Nos. 1 and 2.

The only witness offered by plaintiff who testified in regard to ward No. 2 is F. F. Montgomery. He says: "I was at the voting precinct of ward No. 2 of this parish on the second of November last; the tally list was closed and signed Tuesday night following the election, between eight and ten o'clock; I was a commissioner of election at said precinct. All the tally sheets and ballots were locked up in the box after counting of the votes. The tally sheets were not signed that night. I did not sign the tally sheets at all." On cross-examination he said, "the reason I did not sign the tally sheets that night was because the commissioners did not think the law compelled them to do so; it was not on account of any unfairness or irregularity in the election at said polling precinct at the time of closing the polls that I did not sign them; the tally list was correct at the time it was made out; we completed the list some time Tuesday night following the election between ten and eleven o'clock; I won't be positive about the time, but it was after dark; the election, the counting of the ballots, and the making out of the tally lists at said precinct was fair while I was present; there were no frauds or irregularities in the voting or counting of votes and making out of tally sheets at said precinct so

far as I know ; if there had been any, I would have been apt to have known it, for I watched very closely."

When recalled, he stated : "The commissioners did not, while I was with them, make out a list of all the persons voted for, the offices for which they were voted for, the number of votes received by each, and sign and swear to the same ; I never did sign such a list ; I don't know that the box containing the ballots and tally lists was deposited with the clerk of the district court ; we counted the votes and made a record of what each man received, and put down the names of each candidate and the offices for which they were voted, and the number of votes each man received ; there were three such tally lists as above described made out by the commissioners ; on closing the polls each commissioner swore to the number of votes polled ; they did not swear to the returns above described in my presence."

It is manifest that no court could hold that the election at that precinct was illegal, null and void.

In regard to what occurred at ward No. 1, the facts, as disclosed by the evidence, appear to be that the commissioners of election opened the polls at the door of a small house ; that a rail, which was placed across the door to keep the voters from pressing against the table, upon which the ballot box stood, was broken by the pressure of the crowd, and the commissioners found it necessary to receive the ballots at a window of the same house. This window was between five and a half and seven feet high. Rhodes, a witness, swears the exact height to be five feet nine inches. That when the voter stood at the window he could not see the ballot box ; but he could see the commissioners, and the box was in full view of those who stood a short distance from the window. It appears the officers of election and some of the candidates on both sides, were inside the house, near the ballot box. It further appears that those who desired to handed their ballots with their registration papers to the commissioner, who received them, and that the ballots were deposited in the ballot box. It appears further that a large number of persons voted by putting their ballots and registration papers at the end of sticks and thus reached over the heads of those who stood between them and the window. The witnesses are not agreed about the number who thus voted. One witness says about seventy-five, and another witness says about one hundred and eleven.

D. S. Vinson, a witness, swears as follows : "I observed nothing wrong, except the voting on sticks, and that was a new style to me ; those voting on sticks were standing a distance from the window and reaching over the heads of others, who were close up to the window ; I would have tried to vote in this way myself, if I could have got a stick ; those voting on a stick appeared to be in a hurry to vote."

P. B. Rhodes testified as follows: "I was one of the commissioners of election at the voting precinct No. 1 of this parish, at the last general election; N. Burton was there during the day; I did not hear him make any objections to the way the election was conducted; I heard him say four days after the election that the election was fairly conducted, except, in his opinion, I made a mistake of eleven ballots in counting off against him, and two persons that were not allowed to vote, he thought would have voted for him if they had been allowed to vote. He made no objection, at the election, or after the counting of the votes, that I heard; the exact height of the window where the ballot box was placed is five feet nine inches; no one was compelled to vote on sticks; those persons who were anxious to vote for fear of not having time to vote, got sticks and placed their ballots on the ends of them, and handed them up to the commissioner; the smallest man that I know of could vote by handing his ballot up to the commissioners with his hand."

This testimony is corroborated by S. J. Galbreth, S. P. Austin, W. W. Banham and E. Meyer, and is not contradicted in any material parts by any witness.

E. M. Spann testifies that he was a commissioner at ward No. 1. He says: "Mr. Jackson and myself came to Providence with the first ward box and deposited said box in the clerk's office; the clerk of the court, Mr. Jackson, gave me his receipt for the box; we then went over to Mr. Lockey's office, and I believe Mr. Jackson gave him a copy of the returns; Mr. Lockey then demanded the box, and Mr. Jackson and myself both refused to give said box to him." * * I left him and Lockey talking about the box, and I went down stairs; I saw Mr. Jackson afterward and asked him what he had done with the box, and he told me he had deposited it with Mr. Anderson for safe keeping, and held his receipt for the same; this was Wednesday, after the election, about ten o'clock; the tally lists of ward one was in the box; the ballots were in the box also."

E. Meyer swears he was Deputy United States Supervisor at said precinct; I assisted in making out a list of the votes cast; the tally list was closed and signed about seven o'clock Tuesday evening; I left two of the tally sheets with the commissioners and I kept one; I was present from the time of my arrival until closing of the polls; was at the box all the time, except about half an hour at two different times; I watched the progress of the election closely; had there been any fraud or malpractice in depositing the ballots in the box I would have seen it; there was no fraud nor malpractice in the voting, so far as I know of; I did not see Mr. Jackson put in any wrong ballot, except that one voter handed up on a stick two tickets with his registra-

tion paper, which dropped on the floor, and Jackson put in only one of the two; one of the tickets was a red and one was a white one, and he put in the red ticket.

Mr. Jackson swears that "the election was carried on fairer than I ever saw it before; Mr. Burton, the candidate for sheriff, was present during the entire day, he was in the room all the time; I heard no complaint made by him whatever; he was there when we commenced counting the votes until we closed and signed one of the tally lists, and afterward erased his name."

This is the sum and substance of the testimony on the subject of voting with sticks and at the high window, and of the irregularities at said election, except the testimony of two witnesses offered by the plaintiffs in regard to other illegalities.

Henry Atkins testifies as follows: I saw one man cast more than one ballot on that day; he cast three to my knowledge, and I asked him why he did it, and he said he was doing it for some other persons.

On cross-examination, he states: "The man who voted several times was Cain Sartain; Cain Sartain told me they were for other persons; of these ballots the commissioners called names and passed back the registration papers, and did not call Cain Sartain's name; I handed in tickets the same as Sartain and the commissioners refused until I called their remembrance to Sartain, and they then allowed me to do the same; I was a candidate on the opposite ticket."

Cesar Johnson testified: "I saw ballots handed up very high; I could not see where they went to with the papers that were returned back; some had money returned with them; some had one, some had two, and some three bills; I heard two cry out, Oh, Jackson greenbacks; and when the papers came back they had greenbacks with them." If testimony so absurd and incredible could demand any notice, it is sufficient to say that it is contradicted by nearly every witness who testified in regard to what occurred at that precinct. Mr. Burton, one of the plaintiffs, was at that precinct and near the box, and he has testified in this case, but he does not say a word about bribery; his testimony is in substance that he saw Mr. Jackson change one vote, and that the window was six feet ten inches high where he measured it.

It is evident from the foregoing evidence that the irregularities shown thereby resulted from a want of information on the part of the officers of the election, and that said irregularities did not in any manner affect the result of the election.

In regard to ward two the irregularities seem to be that one of the commissioners did not sign the returns, because he thought it was not necessary, and the correctness of the returns were not sworn to in the

presence of all the commissioners and the counting of the votes was not completed within twenty-four hours after the election.

At ward one the voting on sticks and at a high window, where the voter had to reach up to hand his ballot to the commissioner, was certainly novel; but the excuse for this is given in the foregoing evidence, and the evidence leaves no doubt on our minds that the ballots were fairly deposited in the ballot box, that no fraud was perpetrated at the election, and that the votes were honestly counted.

The fact that the ballot box could not be seen by those voters, who stood near the window, can not be a cause to annul the election. In *Augustin v. Eggleston*, 12 An. 366, this court said: "The mere position of an election box, without any resulting injury, does not avoid an election."

Now, conceding what the defendants admitted, to avoid a continuance, that "the returns, made out for the election in this parish, were not made out and sworn to as the law requires, and that the ballots for ward one will not show the same result as the returns, can that defeat an election in the parish? It has been often decided that the failure to comply with the directory clauses of an election law will not annul an election. Courts can not affix to the omission a consequence which the Legislature has not affixed. 9 An. 577; 10 An. 732; act of 1873, p. 15.

There is an essential difference between the act of voting and the police provisions to secure the evidence of the act. If the votes be deposited, the object of the election is attained, and its validity can not be affected by the non-observance of the directory provisions. 13 An. 301.

The act of 1873, No. 98, provides for the punishment of those who violate its provisions, and the criminal courts of the State have cognizance of such matters. The law does not authorize the election to be set aside, except for fraud, intimidation, violence or corruption, at or before the election, and then only when such fraud, violence, intimidation, etc., had the effect to change the result of the election." Errors of judgment are inevitable; but fraud, intimidation and violence the law can and should protect against." *Cooley's Limitations*, 621. The same author says: "When an election is thus rendered irregular, whether the irregularity shall avoid it or not must depend generally upon the effect the irregularity may have had in obstructing the complete expression of the popular will, or the production of satisfactory evidence thereof. Election statutes are to be tested like other statutes, but with a leaning to liberality, in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated and not otherwise,

their provisions, designed merely for the information and guidance of the officers, must be regarded as directory only, and the election will not be defeated by a failure to comply with them, provided the irregularity has not hindered any one who was entitled from exercising the right of suffrage, or rendered doubtful the evidences from which the result was to be declared." 618. And it was said in *People v. Cook*, 14 Barb. 259, and 8 N. S. 67, "that any irregularity in conducting an election which does not deprive a legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, should be overlooked in a proceeding to try the right to an office depending on such election. This rule is an eminently proper one, and it furnishes a very satisfactory test as to what is essential and what is not in election laws. And when a party contests an election on the ground of these or any similar irregularities, he ought to aver and be able to show that the result was affected by them." *Cooley's C. Lim.* 619; 13 An. 175.

The plaintiffs do not allege that they were elected; they do not allege or attempt to prove that the irregularities complained of changed the result of the election, and when the defendants offered to prove what the actual vote was at each precinct in the parish, as shown by the count of the votes at the polls, the plaintiffs objected on the ground that the ballot boxes were not produced, and this objection was sustained, notwithstanding the facts that the plaintiffs had alleged in their petition that the ballot boxes had not been returned to and kept in the clerk's office as directed by law, and that plaintiffs had sworn that the ballot boxes had been so tampered with and the ballots so changed or altered as to render them unreliable.

Judge Cooley says: "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all," etc., 625. 14 Mich. 320.

The rejection of other evidence on account of the absence of the ballots, which would not be legal evidence if in court, was certainly very strange.

The conclusion we have come to renders it unnecessary to pass upon the exceptions of the defendants.

It is therefore ordered and adjudged that the verdict of the jury be set aside, that the judgment of the lower court be annulled, and that the plaintiffs' suit be dismissed with costs.

MORGAN, J., *dissenting*. The uncontradicted statement of Mr. Far-

rar, one of the counsel for the appellees in the brief, is that the record was filed on Saturday; that he sought to examine it on Monday, when he found it had been taken out of the clerk's office, and that it was not returned until more than three judicial days after the return day.

The custom of allowing counsel to take the records of cases pending an appeal from the clerk's office is, in my opinion, a vicious one; but as it has been tolerated by the court, I do not think that it should prejudice a party's rights. The appellee can not discover what irregularities there are in a transcript unless he has access to the transcript. The ruling of the court, in my opinion, so long as this practice continues to be tolerated, gives to every appellant the power to prevent his appeal being dismissed. He controls the record until the day upon which he is forced by law to file it. He then files it. Under the implied consent of the court, he removes it immediately. He does not return it until three judicial days have elapsed. It may be filled with irregularities and illegalities, and yet the appellee's motion to have it dismissed will not be listened to because he speaks too late.

It seems to me that the court which, by its tolerance, permits an appellee to be placed in such a position, should turn a deaf ear to the appellant, under such a state of facts, when he says that the motion to dismiss was not made in time.

I do not propose to cavil at the ruling of the majority upon the second and third grounds, which they assign for refusing to dismiss the appeal. The questions involved are, in my opinion, too serious to allow their being shuffled off upon mere technicalities. I prefer to take them as I find them, and to express my opinion upon them as I think they should be decided upon the principles of law and right.

And for the same reason I pass over the question as to the misjoinder of parties; the exceptions filed by the defendants, the question of their having been waived by their answers, and the right claimed by them to challenge ten jurors each.

It is to be observed that the defendants do not pretend that the election was conducted in strict compliance with the requirements of the law. They deny, it is true, the allegations in the petition, but they only aver that the election was "substantially legal and fair in every respect."

In my opinion it was illegal and foul from the beginning to the end. The law provides that it shall be the duty of the commissioners of election to receive the ballots of all legal voters who shall offer to vote, and deposit the same in the ballot box to be provided for that purpose; the commissioners are to deposit the ballot of each voter in the ballot box in full view of the voter himself. Acts 1873, section 9 p. 17. In all cases the vote of the person offering to vote is to be

taken from the hand of the voter by one of the commissioners of election; section 10. The votes are to be counted by the commissioners at each voting place immediately after closing the election, and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. These provisions of the law are not only directory, they are peremptory, and they were enacted, I think, in order that the people should be assured of a fair ballot, a fair count, and an honest return.

Now what are the facts? In so far as poll No. 1 at least is concerned, the commissioners of election occupied a room the window of which was more than six feet from the ground. It was through this window that the ballots were handed to the commissioners. The window itself was barricaded with slats, running up and down, some three inches apart. A very large number of the ballots were handed to the commissioners, attached by the voters to a long pole; no voter who was on the outside of the room could deposit his own ballot in the box provided for that purpose, or see that it was deposited there; instances occurred where voters, when they handed up their ballots, called out for "greenbacks" in return, and got them; the greenbacks replacing the ballot on the end of the pole. A majority of the court seems to consider that this portion of the testimony is absurd and incredible, and that it is contradicted by nearly every witness who testified in regard to what occurred at that precinct; I have examined the testimony of every witness whose evidence is in the record, and I do not find it contradicted. If denied at all, it is a negative denial, that is, the witness did not see it. Certainly, witnesses testify that every thing was regular; that the election was a fair one, and that every thing was conducted properly. But the position of the ballot box, the manner of voting, etc., is testified to by every witness, and when men tell me that every thing was fair, and in the same breath say that two opposing candidates each voted several times, under the pretense that they were voting other persons' ballots, and that one did it because the other did, I put no faith in their notions of fairness. And when commissioners of elections, under whose eyes such proceedings were carried on, tell me that there were no irregularities at their polls, I am forced to say that I do not believe them. A majority of the court seems to think that these were mere irregularities resulting from a want of information on the part of the officers of the election. In my opinion they are criminalities for which they should be punished, and which renders their acts void.

When the polls closed the votes were not counted according to law. The ballot boxes in which the ballots were placed, were given to the

clerk of the court, their proper custodian. On the trial, plaintiffs obtained a *subpena duces tecum* upon the clerk ordering him to produce them. He answered that they were not in his possession; that he had given them to R. R. Anderson, a special deputy appointed by him for that purpose. A subpena then issued to Anderson, the return upon which was that he could not be found. When this return was made, plaintiffs moved for a continuance. Thereupon the defendants admitted "that the returns made out for the last election in this parish were not made out and sworn to as the law requires, and the ballots in the boxes from ward No. 1 will not show the same results as the returns." Plaintiffs rested their case. Defendants then attempted to prove the result of the election by parol, and in order to lay a foundation therefor examined David Jackson, who swore that he had made diligent search for the boxes and returns, but had not succeeded in finding them; that he had looked in the only place where he had any idea they could have been placed; that he had inquired of different parties whether they knew anything about where the ballot boxes and returns were, and that he had done every thing since the commencement of the trial to get the boxes and returns. Now Jackson was the clerk of the court, and was by law the custodian of these ballot boxes and returns. He had himself given them to Anderson. On his cross-examination he says he supposes they were in Anderson's possession, and that he had not asked Anderson for them since the commencement of the suit. Thus it appears that he asked every one about them except the only man in whose keeping they had been put. The possession by Anderson of these boxes was the possession of Jackson, and I think it was trifling with the court to say that he could not produce them or cause them to be produced. There was a process by which the defendants, after his testimony was given, could have forced the production of these boxes. They did not see fit to avail themselves of it, and they were not, I think, entitled to resort to secondary evidence. Indeed, what object would they have in producing boxes which, according to their own admissions, would show that the returns were not properly made. And what becomes of their assertion that the election was a fair one in the face of their admission that the ballots in the boxes of ward No. 1 would not show the same results as the returns.

In my opinion these admissions destroy the defendants' case. How is the result of any election to be known except by the returns of the proper officers appointed for that purpose? And who can say that a fair election has been held when it is admitted that the ballots cast would not show the same result as the returns? I am not here contending that every irregularity in the conduct of an election will nullify

 Burton et als. v. Hicks et als.

the election, or that a police law with regard to the manner in which an election is to be held, if unconstitutional, vitiates the election, which was the question before the court in Saucier's case. 13 An. 301. Nor do I contest the principle laid down in Cooley and cited by the Chief Justice in his opinion, that election statutes are to be tested like other statutes, but with a leaning to liberality, in view of the great public purposes which they accomplish, but I do say that where the law specifically provides that an election shall be held in a particular manner and not otherwise, as, in my opinion, the election laws of this State do, it must be held in accordance with the law, and that if the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it is impossible to determine who of the candidates before the people were legally elected. Here it is admitted that the requirements of the law were not complied with.

A jury, taken from the body of the people and selected according to law, themselves forming a portion of the voters of the parish, have declared that there was no legal election in the parish, and the testimony in the record satisfies me that their conclusion was a just and proper one.

I think the judgment of the district court, which sets aside the election, should be affirmed.

WYLY, J. I dissent in this case, and will file my reasons hereafter. Rehearing refused.

 No. 5271.

CITY OF NEW ORLEANS v. THE PEOPLE'S INSURANCE COMPANY.

Because the defendant is required to pay a license, it is no reason why property owned by it should not be taxed like other property of the city of New Orleans.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. S. P. Blanc*, assistant city attorney, for plaintiff and appellee. *Braughn, Buok & Dinkelspiel*, for defendant and appellant.

WYLY, J. The defendant, the People's Insurance Company, appeals from the judgment obtained against it by the City of New Orleans for \$957 for taxes on its capital for the year 1873.

The defense is that there is no law or ordinance authorizing the tax on the capital stock of an insurance company, and if any, it is unconstitutional.

Article 118 of the constitution requires taxation to be equal and uniform, and it specially authorizes the General Assembly to exempt from

taxation property actually used for church, school or charitable purposes. This special authority to exempt property used for certain purposes, has been held by this court to carry with it an implied inhibition from exempting from taxation property used for other purposes, that is to say, property not actually used for church, school or charitable purposes.

We find in the record authority for collecting the tax, and that authority is not repugnant to the constitution. Because the defendant is required to pay a license, is no reason why property owned by it should not be taxed like other property by the city of New Orleans. See *City of New Orleans v. Salamander Insurance Company*, 25 An. 650.

Judgment affirmed.

No. 5733.

T. S. SERRILL v. THE CITY OF NEW ORLEANS.

It is no part of the duty of the clerk of the Finance Department to execute or pay judgments against the city of New Orleans, so as to bind it, and particularly when said city had taken a suspensive appeal of which the clerk was not aware. It is no reason to dismiss the appeal, that the defendant and appellant has acquiesced in the judgment by receiving payment of taxes from the plaintiff in accordance with said judgment. Absence is no excuse for the noncompliance with the requirements of the law and for not objecting, within the proper time, to the assessment roll.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. H. H. Walsh*, for plaintiff and appellee. *S. P. Blanc*, assistant city attorney, for defendant and appellant.

ON MOTION TO DISMISS.

HOWELL, J. A motion is made to dismiss this appeal on the ground that the defendant and appellant has voluntarily accepted and acquiesced in the judgment appealed from, and the appellee has paid his assessment as fixed by said judgment.

It appears that the plaintiff took a rule on the city of New Orleans to have the assessment of his property for taxation reduced; that the rule was made absolute, and the assessment reduced from \$75,000 to \$20,000; that a suspensive appeal was taken by the city; that the plaintiff procured a copy of the judgment, presented it to a clerk in the Department of Accounts and offered to pay; that he was told to call again, which he did in a day or two, and the usual form of bill for taxes at the reduced assessment was furnished in the Finance Department, and he paid it; but the clerk swears that he was not aware that an appeal had been taken, and no notice of the matter seems to have been given to the mayor or city attorney.

Serrill v. The City of New Orleans.

Under these circumstances the city is not bound by the action of the clerk. It is no part of the duty of this clerk to execute or pay judgments against the city, so as to bind the city as claimed.

Motion refused.

ON THE MERITS.

MORGAN, J. No objection is made to the mode of correcting the assessment.

The only testimony in support of the plaintiff is his own evidence, and this, we think, condemns him.

He says he was abroad when the assessment rolls were opened for correction, and did not return until they were closed.

It is evident, then, that he was assessed and that his assessment was placed upon the assessment roll. He should have made his objection to the assessment to the assessment board when the rolls were made out, within the time given him by the law.

His absence "abroad" is no excuse for his not having complied with the requirements of the law.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the rule herein taken be dismissed at plaintiff's costs.

No. 5572.

STATE OF LOUISIANA ex rel. A. P. FIELD, Attorney General, and J. J. HAYES v. CITY OF NEW ORLEANS et als.

The State had the right to pass act No. 60 of the acts of 1872, styled "An Act to establish a hospital for small pox, and other contagious diseases," and in the exercise of its police power to require all indigent cases of small pox or other contagious diseases to be sent by the city of New Orleans to the Luzenburg Hospital, at the expense of said city, and the defendant can be enjoined from contravening this law.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field, Attorney General, T. Wharton Collens and Shackelford*, for relator and appellant. *Samuel P. Blanc*, assistant city attorney, *Lacey & Butler*, for defendants and appellees.

WYLY, J. The plaintiffs enjoined the city of New Orleans from sending or causing to be sent any indigent persons sick with small pox or other contagious diseases to any hospital or place other than the Luzenburg Hospital. The court gave judgment for the defendant dissolving the injunction and plaintiffs have appealed. Act No. 60 of the acts of 1872, styled "An Act to establish a hospital for small pox and other contagious diseases," provides: "That all indigent cases

State ex rel. Attorney General, and Hayes v. City of New Orleans et als.

of small pox, or other diseases reported contagious, in want of or making application for hospital aid or care, shall be sent to the hospital designated in this act (the Luzenburg Hospital) at the expense of the city of New Orleans, as usual and at the usual per diem." It also makes it unlawful for the city or any of its officers to send such indigent cases to any other place, or to violate the provisions of this act and a penalty is imposed against the transgression of said law. That the State had the right to pass the act, and in the exercise of its police power to require all indigent cases of small pox or other contagious diseases to be sent by the city of New Orleans to the Luzenburg Hospital can not be doubted; and that the defendant can be enjoined from contravening this law is equally certain.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that the injunction herein be perpetuated at the costs of the defendant in both courts.

Rehearing refused.

No. 4353.

THOMAS P. LEATHERS v. JOHN W. CANNON AND JESSE K. BELL.

This suit commenced by attachment. The proof is, that Jesse K. Bell leased his dwelling house and furniture; and that, declaring that it was his intention to be absent from the State for two years or longer, traveling for pleasure and health, he left the State without leaving any agent upon whom citation could be served. Shortly after he left, this suit was brought. At that time it would have been impossible to bring him into court except through his property. Under these circumstances the attachment was properly issued. The fact that he did not absent himself as long as he had expected did not affect the attachment previously issued.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *R. H. Marr*, for defendants and appellants.

LUDELING, C. J. The plaintiff sues the defendants for the sum of \$3100, *in solido*. The suit was commenced by attachments against both defendants.

It appears from the record that Cannon and Bell contracted with the government of the United States to carry the mails between New Orleans and Vicksburg twice a week for \$5000 per quarter. Subsequently, they agreed that Thomas P. Leathers should take the place of Bell, carrying the mails once a week and receiving half the contract price. The contract money seems to have been collected through the banks and remitted to the firm of Kennett & Bell, of which Jesse K. Bell was then a member. Cannon never received any more of the money than his share, under the contract. It is manifest, therefore,

Leathers v. Cannon and Bell.

that under the facts above stated, Cannon is not liable to the plaintiff, and the demand against him should be rejected, with costs.

As to Bell, his liability is not disputed; the controversy is as to the amount due.

The evidence satisfies us that the account or statement rendered by the defendant Bell is correct, except as to the fifty-seven commissions. There was no agreement to pay commissions. C. C. 2991. These commissions retained on previous collections amount to \$375, which, added to \$2419 91, make \$2794 91; for which there should be judgment against Jesse K. Bell.

The appellee has asked us to amend the judgment dissolving the attachment as to Jesse K. Bell, and we are of opinion that the judgment should be so amended. The proof is, that Jesse K. Bell leased his dwelling house and furniture, and declaring that it was his intention to be absent from the State for two years or longer, traveling for pleasure and health, he left the State without leaving any agent upon whom citation could be served. Shortly after he left, this suit was brought. At that time it would have been impossible to bring him into court except through his property; and, we think, under the circumstances the attachment was properly issued. The fact that he did not absent himself so long as he expected, did not affect the attachment previously issued.

It is therefore ordered and adjudged that the judgment of the lower court be set aside, and that there be judgment in favor of the plaintiff against Jesse K. Bell for \$2794 91, with legal interest from judicial demand, and a lien and privilege on the property of Bell attached and costs in the lower court; and that there be judgment in favor of John W. Cannon against Thomas P. Leathers, rejecting his demand with costs. The costs of appeal to be paid by the appellee.

WYLY, J., *dissenting*. The harsh remedy of attachment this court has never permitted to be applied to other cases than those specified by law. An attachment will lie when the debtor is about to leave the State permanently. C. P. 240. It will not lie when he is only about to absent himself temporarily. Here Bell was only making a trip to Europe, expecting to be absent for the period of two years. He, however, returned within four months. For many years his domicile has been in this city, and there is nothing connected with this trip to Europe calculated to produce the impression on any one that he was leaving the State permanently. His property was here and there was not the slightest foundation for the belief that he was about to change his domicile. I dissent.

Rehearing refused.

No. 5671.

SUCCESSIONS OF TREVILLE DAIGLE AND MARY JANE RODDY, his wife.

This appeal has been taken and brought up, and the fact that it is designated as a suspensive appeal is not a cause for dismissal, on the ground that it is from a judgment on an opposition to the appointment of an administrator, which the law does not allow. There is no objection to the sufficiency of the appeal bond, which is for a sum fixed by the court, or the right to an appeal from the judgment as a devolutive appeal.

Conceding that there was in this case such a contestation for the administration of the estate of the deceased as to authorize the appointment of the public administrator to administer until the final decree determining the rights of the respective claimants, as provided by section two of act 87 of the session of 1870, the judge erred in giving the permanent administration to him, as this is not a case in which the public administrator could be appointed, the heirs being present and represented. When the major heir failed to furnish bond and qualify, the tutor of the other heir should have been appointed.

A PPEAL from the Parish Court, parish of East Baton Rouge. *Davis, J. J. & G. W. Burgess*, for E. Cousinard, appellant. *E. W. Robertson*, for Mrs. Willoughby, appellee.

HOWELL, J. A motion is made to dismiss this appeal, because it is a suspensive appeal from a judgment on an opposition to the appointment of an administrator, which the law does not allow.

The appeal has been taken and brought up, and the fact that it is designated as a suspensive appeal is not a cause for dismissal. There is no objection to the sufficiency of the appeal bond, which is for a sum fixed by the court, or the right to an appeal from the judgment as a devolutive appeal.

The motion is refused.

The appellant, Ed. Cousinard, as dative tutor of the minor Mary S. Daigle, applied for letters of administration of the successions of her deceased parents. Mary W. Willoughby, daughter of Treville Daigle by a previous marriage, opposed this application; asked that she, with her husband, be appointed to administer, and that in case they be unable to give bond, the public administrator be appointed, and that he be appointed provisionally pending the contest. The parish judge granted the order for the provisional appointment. This occurred in November, 1873.

On the second of January, 1874, Cousinard filed a motion to fix a day by which Mr. and Mrs. Willoughby should furnish bond and qualify, and, in default thereof, that he be appointed, as claimed in his original application, and that the order appointing the public administrator be rescinded. The judge fixed the first Monday of the next term (February) as the date by which they should comply, and, in default, show cause why Cousinard should not be appointed, and ordered the parties to be notified. On the eighteenth of February Mrs. Willoughby filed the plea of *lis pendens*, and again averred that if she could not furnish bond the public administrator was entitled to retain the admin-

Successions of Daigle and Mary Jane Roddy, his wife.

istration in preference to Cousinard. On the trial of the issue thus formed, the judge rendered judgment authorizing the public administrator to administer the said successions, the major heir, Mrs. Willoughby, failing to give bond.

From this judgment Cousinard appealed.

Conceding that there was such a contestation for the administration as to authorize the appointment of the public administrator to administer until the final decree determining the rights of the respective claimants, as provided by section two of act 87 of 1870, the judge erred in giving the permanent administration to him, as this is not a case in which the public administrator could be so appointed, the heirs being present and represented. When the major heir failed to furnish bond and qualify, the tutor of the other heir should have been appointed.

It is therefore ordered that the judgment appealed from be reversed, and that Edward Cousinard be appointed and authorized to administer the successions of Treville Daigle and Mary J. Roddy, his wife, upon complying with the requisites of the law; costs to be paid by the appellee.

No. 5512.

GEORGE D. PRITCHETT *v.* MECHANICS AND TRADERS' INSURANCE COMPANY. MRS. SARAH C. LANE, Intervenor.

Clark, as the agent of Mrs. Lane, having entered into a contract of assurance with defendant and paid the premium with her means, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel R. and O. L. Walker*, for plaintiff and appellant. *E. W. Huntington*, for defendant and appellee. *E. H. Farrar*, for intervenor and appellee.

LUDELING, C. J. This suit is for \$2,000, insurance on a loss by fire. The material portions of the policy is as follows:

"The Mechanics & Traders' Insurance Company * * do insure Mrs. Sarah C. Lane against loss or damage by fire to the amount of two thousand dollars on the frame shingled roof gin house situated on Oak Grove plantation, Madison parish, \$1000; on machinery and appurtenances in same \$1000, subject to three-fourth country clause.

Loss on machinery, if any, payable to the extent of two thousand dollars to George D. Pritchett."

The defendant admits its liability for \$1518 75. The only question for decision is to whom shall the company pay, to Mrs. Lane or to Mr. Pritchett?

Pritchett v. Mechanics and Traders' Insurance Company.

The evidence shows that the plantation belonged to Mrs. Lane, that she had leased it to J. G. Clark, who owned the machinery in the gin, which he had purchased from Pritchett, and for which he owed the price, evidenced by a note. The lessee was required to keep the gin insured for the benefit of the lessor, and deduct from the rents due the premium; and Clark, as the agent of Mrs. Lane, entered into the contract of assurance aforesaid with the defendant, and paid the premium with her means. He could not direct the insurance money to be paid to his own creditor—it belonged to his principal. 1 La. 220.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 5270.

CITY OF NEW ORLEANS v. GERMANIA INSURANCE COMPANY.

This case does not differ from the one of the City of New Orleans v. The Salamander Insurance Company, reported in the 25th An. This court gave to that case the most attentive and careful consideration, and does not see any reason for changing, in this instance, the conclusions arrived at in said Salamander controversy.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. S. P. Blanc*, assistant city attorney, for plaintiff and appellee. *Braughn & Buck* and *Dinkelspiel*, for defendant and appellant.

MORGAN, J. This case does not differ from the one of the City of New Orleans v. The Salamander Insurance Company, 25 An. 650.

Counsel for appellant admit that if that case stands this appeal falls. He contends, however, that it is not founded on good law.

We gave the case when it was first presented, and afterward on an application for a rehearing, our careful consideration. We have not been convinced that the conclusions we then came to were erroneous. Judgment affirmed.

There was no session of the Supreme Court of Louisiana at Opelousas in June 1875.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
MONROE.

JULY, 1875,

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. P. H. MORGAN.

Associate Justices.

No. 580.

JAMES MARKS v. C. C. MARTIN.*

By the confirmation by Congress, on the third of March, 1857, of the selections made by the State of lands granted to her by the act of Congress, approved March 2, 1849, and the act approved September 28, 1850, and by the act of the State No. 104, of the acts of 1871, confirming all sales and locations of public lands made by the State from the first day of January, 1861 to fourteenth October, 1864, the land in controversy, in this instance, was severed from the public domain, and the subsequent grant thereof by the United States in no manner impaired or defeated the title previously acquired by the State and transferred to plaintiff.

The position taken by defendant that the land department decided the land to belong to him, and that their action precludes the investigation and determination of the case by this court, is unfounded.

The officers of the land department may adjudicate the title of the United States, and to that extent the adjudication is final. It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to lands. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the land department gave the defendant none, and the question whether the United States had any title at the time of the adjudication, is clearly a question for the courts of justice, and not for the officers of the land department to decide.

APPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J. Land & Taylor, for plaintiff and appellee. *W. D. Wyke and Henderson*, for defendant and appellant.

WYLY, J. Plaintiff brought this petitory action for the recovery of a tract of land known as the southwest quarter of section seven, township twenty, range fourteen, lying in the parish of Caddo.

There was judgment in his favor and defendants appeal.

The land in question was selected by the State on the eighteenth May, 1852, under the provisions of the act of Congress, approved Sep-

tember 28, 1850, granting swamp and overflowed lands to the State. The same land was also subsequently selected by the State under act of Congress, approved March 2, 1849. The selections made by the State under said grants were confirmed by act of Congress, approved March 3, 1857, entitled "An Act to confirm to the several States the swamp and overflowed lands selected under the act of September 28, 1850, and the act of the second March, 1849."

Plaintiff's vendor, James E. Wood, bought this land from the State in February, 1862, and the title was confirmed by the State by act 104 of the acts of 1871, an act confirming all sales and locations of public lands made by the State from the first day of January, 1861, to October 14, 1864. Plaintiff acquired by deed from Wood, and shows a regular chain of title from the United States to the land in question.

On the other hand, the defendant shows a purchase and patent for this land from the United States long after the selection by the State and the confirmation thereof by the act of Congress, approved March 2, 1857.

By this confirmation of the selections made by the State under the grants referred to, this land was severed from the public domain, and the subsequent grant thereof by the United States in no manner impaired or defeated the title previously acquired by the State. 11 La. 582; 9 An. 102; 13 Pet. 498. We regard the title of plaintiff as a good one, and conclude that he is the lawful owner of the land.

The position taken by defendant that the land department decided the land to belong to him, and their action precludes the investigation and determination of the case by this court, is unfounded. The precise question was decided by this court adversely to this view of defendant in a similar case, to wit: The case of *Copely v. Dinkgrave*, 26 An., not reported. It was there held that the action of the officers of the land department adjudicated the title of the United States, and to that extent the adjudication was final. It is not for this court or any other to interfere with the discretion of the land officers of the United States, in their transfer to whomsoever they may choose, of the title of the United States to land. But if the United States at the moment of the adjudication had no title to the land in question, this action of the officers of the land department gave the defendant none. And the question whether the United States had any title at the time of the adjudication, is a question for the courts of justice, clearly, and not for the officers of the land department to decide. *Garland v. Wynn*, 20 Howard 6; 1 Peters 212; 9 Howard 328; 14 Howard 377; 18 Howard 44; 4 R. 79; 13 An. 356; 20 An. 433.

It is therefore ordered that the judgment herein in favor of plaintiff be affirmed with costs.

Rehearing refused.

*Carried by writ of error to the Supreme Court of the United States.

No. 512.

THOMAS B. LEE v. R. C. CUMMINGS AND PAULINA PICKETT. CHARLES E. ALTER et als. Intervenor.

On sixth February, 1857, Mrs. Pickett conveyed to Cummings the usufruct for life of the Chalk Level plantation by act under private signature. On twentieth November, 1865, Cummings mortgaged to Mrs. Pickett the Chalk Level plantation, A. H. Leonard accepting the mortgage as agent of Mrs. Pickett, who thereby, it is alleged, as well as those who might claim under her, was estopped from denying Cummings' title to said plantation, because she had accepted a mortgage from him and thus tacitly acknowledged him as owner thereof. On the twenty-fourth of November, 1866, Alter recorded a judgment which he had obtained against Cummings in the parish of Bossier. On third July, 1866, Mrs. Pickett mortgaged the Chalk Level plantation to Lee to secure ten notes for \$10,000 each.

On the second September, 1866, Mrs. Pickett, by act under private signature, renounced in favor of Lee the priority of her mortgage acquired from Cummings.

On the seventh of December, 1872, the Chalk Level plantation being sold at the suit of Lee and purchased by the Union Bank, the proceeds of this sale are now the subject of this controversy.

Prior to the sale, the Citizens' Bank, the Union Bank and Mary B. Conner had filed their opposition, alleging that they held notes secured in the same mortgage from Mrs. Pickett to Lee, which said notes Lee had indorsed to them and therefore they were entitled to be paid by preference over Lee out of the proceeds of the sale of the mortgaged property. Alter also filed a third opposition setting up his mortgage rights.

The inquiry is limited to the validity and extent of Alter's rights as against plaintiff and the opponents, the Citizens' Bank, the Union Bank, and Mary B. Conner, in relation to the proceeds of the sale.

Cummings had no title from Mrs. Pickett which had effect as to third persons, because none was recorded in the book of conveyances in the recorder's office of the parish of Bossier. It was not disclosed to the public, when the mortgage of Mrs. Pickett to Lee was granted, and there is no evidence that it has ever been disclosed by registry in the parish of Bossier, where the Chalk Level plantation is situated. The registry in the mortgage book would be good for a mortgage, but would be no registry for a title. Therefore the mortgage granted by Mrs. Pickett on the second of July, 1866, to Lee on the Chalk Level plantation, the title of which stood on the public records in her name, is not defeated by the judicial mortgage of Alter against Cummings.

As mortgagee of the usufruct which Mrs. Pickett attempted to create in favor of Cummings, Alter is equally unfortunate. The registry of his judgment against Cummings did not give him a mortgage on the right of usufruct of the Chalk Level plantation. The act granting it is an act under private signature, and therefore invalid as a donation. It is not good as a sale or a giving in payment, as there was no price stated in the act.

If, however, Cummings had the right of usufruct, and Alter, by the registry of his judgment against him, had acquired a mortgage thereon, Alter should have asked for a separate appraisal prior to the sale, in order that his part of the proceeds should be ascertained with legal certainty.

A PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J. N. O. Blanchard*, for plaintiff and appellee. *Land & Taylor*, for Alter, third opponent and appellant. *Nutt & Leonard*, for Union Bank, Citizens' Bank, and Mary B. Conner, third opponents and appellees.

MORGAN, J. On the sixth of February, 1857, Paulina Pickett, by act under private signature, declared as follows: "State of Louisiana, parish of Bossier, be it remembered hereby, that I, Paulina Pickett, of the above residence, for and in consideration of the recitals herein-after made, do hereby bargain, sell, grant, transfer and convey unto

Robert C. Cummings, of the city and parish of Orleans, in the State of Louisiana, the following described property, all lying in the parish of Bossier and State of Louisiana, namely, the following lands. * * * This conveyance is for the term of the natural life of the said Robert C. Cummings, the intention of this conveyance being to give to the said Cummings the usufruct of all the aforescribed property for and during his natural life. It is the object of this conveyance to give the said usufruct, as aforesaid, to commence with the first of the current year, and to embrace the crops of every description that shall be made on said plantation the current year, together with the provisions of every description, and plantation supplies now on said plantation, and all the rights, privileges and improvements appertaining to said plantation, land, slaves, etc. And to the end that the said Cummings may fully enjoy the estate herein conveyed to him in full property for the term aforesaid to be by him used, occupied, farmed, leased, and enjoyed in his own name.

"The consideration of the above conveyance is the affection I have and bear towards the said R. C. Cummings, as well as the obligations I feel under toward him for his personal services and attention to my business as well in the parish of Bossier as elsewhere."

On November 20, 1865, Cummings, to secure Mrs. Pickett against liability on certain accommodation paper, amounting to \$300,000, which she had given for the benefit of R. C. Cummings & Co., executed a mortgage on the Chalk Level plantation. In this act of mortgage his usufruct is not mentioned.

On the third July, 1866, Mrs. Pickett mortgaged to the plaintiff, T. B. Lee, the Chalk Level plantation to secure the payment of ten notes for the sum of ten thousand dollars each, which notes were drawn by Cummings in favor of Lee.

On the third September, 1866, by private act Mrs. Pickett executed a release of the mortgage granted to her by Cummings, and required the recorder of Bossier parish to make Lee the first mortgage, reserving to herself the second mortgage. The act recites:

"Know all men by these presents, that I, Mrs. Paulina Pickett, of the parish of Bossier, in the State of Louisiana, do hereby declare as follows, to wit: that whereas, by an act dated Caddo parish, the twentieth November, 1865, R. C. Cummings did specially mortgage and hypothecate in my favor his life interest in the Chalk Level plantation," etc.

Lee caused the Chalk Level plantation to be seized under his mortgage. It was sold, the proceeds remaining in the hands of the purchaser. Prior to the sale the Citizens' Bank, Mrs. M. B. Conners, and the Union National Bank filed their oppositions claiming the proceeds

of the sale of the land on the ground that they were the holders of some of the series of the notes given by Cummings to Lee, and secured by the same mortgage.

Alter filed his opposition, claiming the proceeds of this plantation. He claims a mortgage arising from the registry made on the twenty-fourth March, 1861, in the recorder's office of Bossier parish, of a judgment rendered in his favor, against Cummings & Co., by the Third District Court of New Orleans, on the twenty-sixth January, 1866, for the sum of \$46,150; also a legal mortgage upon the land resulting from the registry in the same office, of a judgment in his favor, against Mrs. Pickett, as garnishee, rendered by the same court on June 13, 1866. He alleges that the registry of these judgments operated as a mortgage on all the interest Cummings had in the Chalk Level plantation; that at the time of the registry of the judgment Cummings was the usufructuary of the land, and that he is still the usufructuary and in possession thereof. He contends further that Mrs. Pickett, having in the mortgage from Cummings to herself, acknowledged Cummings to be the owner of the land, it is now subject to the mortgage resulting from the registry of the aforesaid judgments in his favor, and he therefore claims to be paid by preference over Lee.

The decision in the case of *Alter v. Pickett*, from which resulted the judicial mortgage in Alter's favor, recorded in Bossier parish and affecting the Chalk Level plantation, was reversed. When the judgment fell, the mortgage upon which it rested fell with it, and the contest between the parties is disembarrassed of this element of difficulty. They are left to contest their rights upon the following state of facts: Alter, as the judgment creditor of Cummings, claims to have a mortgage upon the plantation, superior to the one under which the plaintiff and intervenors set up their rights, because he says Mrs. Pickett, when she took a mortgage from Cummings on the Chalk Level plantation thereby acknowledged the title of the plantation to be in him, and that inasmuch as his judgment was recorded before the act of mortgage from Mrs. Pickett to Lee was passed, his claim is superior to Lee's. And he contends that Cummings' title to the plantation can not be questioned.

"If the contest here was between Mrs. Pickett and Cummings, or a party claiming against them, either individually or together, the doctrine of estoppel would have to be considered. But others' rights are in the scale, and estoppel, which applies only to the parties or their *ayant cause*, can not weigh against them."

It is to be observed that there is no question of usufruct here, or whether the usufruct passed with the sheriff's sale, or the title thereto. The usufruct not having been sold, the sole question is, did the record-

ed judgment of Alter against Cummings in the parish of Bossier affect the Chalk Level plantation?

To mortgage a piece of property, the mortgager must be the owner of it. Now Cummings was never the owner of the Chalk Level plantation. He had the usufruct of it, but usufruct is defined to be the right of enjoying a thing the property of which is vested in another, and we are quite convinced that when Mrs. Pickett took her mortgage from him, she never fancied that she was taking any thing more than a mortgage upon his usufruct. Under no circumstances can this act of mortgage be looked upon as a title to the property, or an acknowledgment that it belonged to him, at any rate in so far as to affect the rights of third persons. So far at least as the public was concerned, Mrs. Pickett's title to the property was not changed, and the mortgage which she gave to Lee was perfectly good, valid, and binding in favor of all those who held obligations secured thereby.

At the threshold of this investigation therefore an impassible barrier is presented to Alter's pretensions, and this renders an examination of the other points which have been presented and ably argued unnecessary.

Judgment affirmed.

ON REHEARING.

WYLY, J. On sixth February, 1857, Mrs. Paulina Pickett conveyed to R. C. Cummings the usufruct for life of the Chalk Level plantation by act under private signature, the consideration being her affection for him "as well as the obligations I feel under toward him for his personal services and attention to my business as well in the parish of Bossier as elsewhere."

On twentieth November, 1865, Cummings mortgaged to Mrs. Pickett the Chalk Level plantation to secure her against liability on accommodation paper, amounting to \$300,000, given by her to Cummings & Co., A. H. Leonard accepting this mortgage as agent of Mrs. Pickett.

On twenty-fourth March, 1866, Charles E. Alter recorded a judgment which he had against Cummings in the parish of Bossier; and it is this right, as mortgage creditor of Cummings, which he asserts against the proceeds of the sale of the Chalk Level plantation.

On third July, 1866, Mrs. Pickett mortgaged the Chalk Level plantation to Thomas B. Lee to secure ten notes for \$10,000 each.

On third September, 1866, Mrs. Pickett by act under private signature renounced in favor of Lee the priority of her mortgage acquired from Cummings, the act reciting that "whereas, by an act dated Caddo parish, November 20, 1865, R. C. Cummings did specially mortgage in my favor his life interest in the Chalk Level plantation."

On eighth October, 1872, Thomas B. Lee sued out an order of seizure and sale on one of the ten mortgage notes he acquired on third July, 1866, and the Chalk Level plantation was sold thereunder on seventh December, 1872, to the Union Bank; and the proceeds of this sale are now the subject of controversy. Prior to the sale the Citizens' Bank, the Union Bank, and Mary B. Conner filed third oppositions, alleging that they held notes secured in the same mortgage from Mrs. Pickett to Lee, which said notes Lee had indorsed to them and therefore they were entitled to be paid by preference over Lee out of the proceeds of the sale of the mortgaged property.

Charles E. Alter also filed a third opposition, setting up his mortgage rights, resulting from the registry of his judgment against Cummings in Bossier parish on twenty-fourth March, 1866, and alleging that the Chalk Level plantation (the proceeds of which are in controversy) belonged to Cummings; that Mrs. Pickett and those claiming under her are estopped from denying Cummings' title to said plantation, because she accepted a mortgage on said plantation from him on twentieth November, 1865, thereby tacitly acknowledging him as owner thereof. He also claims a mortgage on the usufruct of Cummings in the event it should be held that he only held the right of a usufructuary on said plantation; and as mortgagee of the right of usufruct he claims a portion of the proceeds of the sale of said plantation equal to the value thereof, in view of the fact that said right of usufruct was sold, as he alleges, under the foreclosure of the mortgage of Lee. The court below rejected the demand of Alter, dismissed his opposition, and distributed the proceeds of the sale of the Chalk Level plantation between the other opponents and plaintiff. From this judgment Charles E. Alter has appealed.

The inquiry is limited then to the validity and extent of his rights as against plaintiff and the opponents, the Citizens' Bank, the Union Bank and Mary B. Conner in relation to the funds in controversy.

If the Chalk Level plantation belonged to R. C. Cummings and appeared so in the notarial books of the parish of Bossier, Alter would have a right to the proceeds superior to the other parties to this suit, because his judicial mortgage ranks from twenty-fourth March, 1866, the day he recorded his judgment against Cummings, and this was prior to the mortgage given by Mrs. Pickett out of which the rights of all the appellees arise.

But Cummings had no title from Mrs. Pickett which had effect as to third persons, because none was recorded in the book of conveyances in the recorder's office of the parish of Bossier.

The only evidence of title in him was Mrs. Pickett's implied acknowledgment when she accepted from him a mortgage on her Chalk Level plantation, if indeed she did ratify the act of A. H. Leonard,

Esq., who without authority accepted in her behalf the mortgage from Cummings. If, instead of an implied recognition of title, which Mrs. Pickett was estopped from denying, she had made to Cummings a regular conveyance of the Chalk Level plantation, and the deed was not recorded, it would be without effect as to third persons accepting title or a mortgage subsequently from Mrs. Pickett who appeared on the public records as the owner of the Chalk Level plantation.

It is not pretended there was a registry in the conveyance books of the parish, of the mortgage which operated the estoppel, assuming that such would amount to a public notice of title, about which we express no opinion.

As to third persons, therefore, the pretended title of Cummings was utterly without effect. It was not disclosed to the public when the mortgage of Mrs. Pickett to the appellees was granted, and there is no evidence that it has ever been disclosed by registry in the parish of Bossier, where the Chalk Level plantation is situated. The registry in the mortgage book would be good for a mortgage, but would be no registry for a title. Our conclusion, therefore is, that the mortgage granted by Mrs. Pickett, on third July, 1866, to Thomas B. Lee on the Chalk Level plantation, the title of which stood on the public records in her name, was and is not defeated by the judicial mortgage of Charles E. Alter against R. C. Cummings. As a mortgage creditor Alter can not successfully contest with the appellees for the proceeds of the sale of the Chalk Level plantation.

As mortgagee of the usufruct which Mrs. Pickett attempted to create in favor of Cummings he is equally unfortunate. The registry of his judgment against Cummings did not give Alter a mortgage on the right of usufruct of the Chalk Level plantation, because no such right was legally acquired by Cummings. The act granting it is an act under private signature; and therefore invalid as a donation. It is not good as a sale or a giving in payment, as there was no price stated in the act. If, however, Cummings had the right of usufruct, and Alter, by the registry of his judgment against him, had acquired a mortgage thereon, Alter should have asked for a separate appraisal prior to the sale, in order that his part of the proceeds could be ascertained with legal certainty. On the whole, we are satisfied that the judgment appealed from is correct.

It is therefore ordered that our former judgment rendered in this case remain undisturbed.

MORGAN, J., *concurring*. I concur for the reasons assigned in the former opinion of the court.

LUDELING, C. J., *dissenting*. I dissent in this case on the grounds that the third opponent had the first mortgage on the property sold, and I reserve the right to state hereafter my reasons for this opinion.

No. 479.

THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA
v. JOHN W. MASON et als.

The peculiar principles upon which the Consolidated Association of the Planters of Louisiana was organized, the important purposes it was intended to subserve, and the enduring character which was required to be given to it, rendered essentially necessary that the enforcement of its obligations should not be defeated or delayed by pleas and defenses admissible in regard to ordinary hypothecations. The important interests of the State were also to be protected.

It is a pre-eminent feature in the charter of the Consolidated Association of the Planters of Louisiana that no future change of ownership or possession of the property mortgaged to secure the stock subscribed or the loan made, should ever prevent or delay the enforcement of the mortgage against the property, to collect whatever sum might be due by the original mortgager. It was on these conditions that the State became the indorser on the bonds issued by this association in 1838. There is no place for delays or calls in warranty, nor operation of prescription of its debts, or peremption of its mortgages.

Reference must be made in this instance to Civil Code, article 3333, amended by act of 1842, which declares "that the rule requiring the reinscription of mortgages at the expiration of ten years from date of their registry shall not apply to the mortgages which have been or may be given by the stockholders of the various property banks of this State."

APPEAL from the Fourteenth Judicial District Court, parish of Ourchita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee: *R. Richardson and McEnery, Stubbs & Cobb*, for defendants and appellants.

TALIAFERRO, J. This case was before us at the July term of this court 1872, and was then remanded for further proceedings. See 24 An. 518.

When the case was again taken up in the court below the executors of Hart, present possessors, after the general issue urge again the exceptions previously filed, and which were overruled by this court in July, 1872. They further admit that the land they are in possession of forms part of the land originally mortgaged by Mason to the Planters' Association, allege that their testator bought the same from Calderwood, and pray that the heirs of Calderwood be called in warranty. This prayer for the call in warranty was refused. Mrs. Mason adopted the defenses set up by Hart and others, as to the description of property, etc. She further pleads the prescription of three, five and ten years; on the part of the other defendants, the prescription of one; three, five and ten years against the plaintiff's demand and the prescription of ten years against the failure to reinscribe the mortgage originally recorded, April 17, 1830.

The plaintiff had judgment for the amounts claimed, with recognition of the mortgage right asserted, accompanied with an order that the mortgaged premises as described in the act of mortgage be seized and sold, being the same now in the possession of the executors of James Hart, and the venders of James Hart and of his estate acquired

by James Hart from John Calderwood, by deed dated twenty-sixth September, 1866, a copy of which is annexed to the answer of Joseph W. Locke and Benjamin Hart.

From this judgment the defendants have appealed.

It is not important to examine the bills of exception presented by the record. In relation to the issues made in the lower court, three questions are presented :

First—Did the judge *a quo* err in refusing the call in warranty ?

Second—Can defendants avail themselves of the fact that the mortgage had not been reinscribed within the ten years next preceding the date of their purchase ?

Third—Is the debt prescribed ?

We are of the opinion that each of these questions must receive a negative answer.

The peculiar principles upon which the Consolidated Association of the Planters of Louisiana was organized, the important purposes it was intended to subserve, and the enduring character which was required to be given to it, rendered it essentially necessary that the enforcement of its obligations should not be defeated or delayed by pleas and defenses admissible in regard to ordinary hypothecations. The important interests of the State too, were to be protected. It is a prominent feature in the charter of the association that no future change of ownership or possession of the property mortgaged to secure the stock subscribed or the loan made, should ever prevent or delay the enforcement of the mortgage against the property, to collect whatever sum might be due by the original mortgager. It was on those conditions that the State became the indorser on the bonds issued by this association in 1828. Acts of 1828, p. 32. Hence the charter provides specially against delays and impediments in collecting its dues in the prompt manner provided for. There is then no place for delays, for calls in warranty, nor operation of prescription of its debts or peremption of its mortgages. Provisions to this effect are found in sections 22, 24 and 25, of the act incorporating the association ; Charter of sixteenth March, 1827, and amendatory act of nineteenth February, 1828, prescribing the terms of the mortgage, etc. See Civil Code, article 3333, amended by act of 1842, which declares "that the rule requiring the reinscription of mortgages at the expiration of ten years from date of their registry, shall not apply to the mortgages which have been or may be given by the stockholders of the various property banks of this State."

We think the judgment appealed from correct.

Judgment affirmed.

Rehearing refused.

Spears, Tutor, v. Mrs. M. J. Spears, Administrator.

No. 538.

J. B. SPEARS, Tutor, v. MRS. M. J. SPEARS, Administrator.

When defendant admitted the validity of the note sued upon and pleaded against it the extinguishment, novation and settlement stated in the answer, no proof was required of plaintiff to establish an indebtedness on the note, the law requiring no one to prove what is admitted in the answer.

The objection that the answer was not offered in evidence is frivolous. Pleadings make up the case, and are never offered in evidence on the trial thereof.

The judge *quo* did not err in refusing to permit defendant to set up and prove an individual account against plaintiff in compensation or discharge of a debt due to him as tutor. The rights of the minors whom plaintiff represents in this action are in no manner affected by his individual indebtedness to defendant.

The entries made in plaintiff's books in the handwriting of J. P. Spears, the bookkeeper, against himself, or debiting himself, were admissible against the succession of the latter. The declarations or statements of the witness Post to plaintiff, previous to the trial, were not admissible against plaintiff, because they were the declarations or statements of a third person, not a party in interest.

The claim of reversal of judgment because, as written, it is absolute, and not a judgment to be paid in due course of administration, is not well founded. This was evidently a clerical error in drawing the judgment, and is of no consequence, because the judgment must be construed in reference to the petition, wherein it is prayed that plaintiff's demand be paid in due course of administration.

A PPEAL from the Eleventh Judicial District Court, parish of Union.
Trimble, J. J. C. Egan, for plaintiff and appellee. *G. H. Ellis*, for defendant and appellant.

WILY, J. The defendant, the administratrix of the succession of J. Spears, appeals from the judgment against her for \$387 86 on an account, and the further sum of \$1100, the amount of a note, with eight per cent per annum interest thereon from eighteenth June, 1870. The answer denies any indebtedness except on the note attached to plaintiff's petition, which has been "extinguished, novated and settled" as stated in the answer. The alleged extinguishment or settlement of the note has not been established by the defendant, who now contends that the judgment for the amount of the note should be annulled because plaintiff neglected to offer it in evidence. When defendant admitted the validity of the note and pleaded against it the extinguishment, novation and settlement stated in the answer, no proof was required of plaintiff to establish an indebtedness on the note, the law requiring no one to prove what is admitted in the answer.

Under the pleadings in regard to the note, the only question was whether there was an extinguishment, novation or settlement as alleged by the defendant, upon whom the proof devolved. The objection that the answer was not offered in evidence is frivolous. Pleadings make up the case, and are never offered in evidence on the trial thereof. The evidence supports the judgment on the account. The court did not err in refusing to permit defendant to set up and prove an individual account against plaintiff in compensation or discharge of a debt due to him as tutor. The rights of the minors whom plaintiff

Spears, Tutor, v. Mrs. M. J. Spears, Administrator.

represents in this action are in no manner affected by his individual indebtedness to defendant. The entries made in plaintiff's books in the handwriting of J. P. Spears, the bookkeeper, against himself or debiting himself, were admissible against the succession of the latter. The declarations or statements of the witness Post to plaintiff previous to the trial were not admissible against plaintiff, because they were the declarations or statements of a third person not a party in interest. The court did not err, and the bills of exceptions were not well taken.

The statement in the brief of defendant that the judgment allows eight per cent interest on the indebtedness on the account is incorrect; no interest was allowed on this part of the claim. The judgment only allows eight per cent. interest on the amount of the note from the maturity thereof.

The defendant also claims a reversal of the judgment, because, as written, it is absolute and not a judgment to be paid in due course of administration. This was evidently a clerical error in drawing the judgment, and is of no consequence, because the judgment must be construed with reference to the petition, wherein it is prayed that plaintiff's demand be paid in due course of administration. The prescription of three years was not well pleaded. On the whole, the defense is without merit.

Judgment affirmed.

Rehearing refused.

No. 592.

MRS. M. A. FOSTER v. WM. H. WISE.

The extension of the time of payment of a certain mortgage note was really the consideration of the note in suit, and this was a lawful consideration.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. N. O. Blanchard*, for plaintiff and appellant. *Egan & Wise*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment rejecting her demand on a promissory note for \$742 23, the defendant being surety on said note.

The defense is, the consideration of said note is usurious interest.

It is shown that Will and Ben Crowder, the makers of the note in suit, were owing plaintiff \$4563 88, evidenced by their mortgage note maturing first January, 1871, bearing eight per cent. per annum interest; that in order to get an extension of the maturity of said note they agreed to pay the additional sum evidenced by the note in suit, being

Mrs. M. A. Foster v. Wise.

seven per cent. on the amount of the large debt the payment of which plaintiff agreed to extend for them and did extend for them pursuant to said agreement. The extension of the time of payment of the mortgage note was really the consideration of the note in suit, and this was a lawful consideration.

It is therefore ordered that the judgment herein be annulled, and it is decreed that plaintiff recover of the defendant seven hundred and forty-two dollars and twenty-two cents, with eight per cent. interest thereon from March 1, 1873, and costs of both courts. See 26 An. 477; Revised Code 1900, 1767, 1885, 1896. See also Willis v. John and Charles Chaff, lately decided.

No. 531.

D. C. MORGAN v. E. M. JOHNSON.

This is a petitory action, based on untenable grounds. The sheriff, under whose sale the tract of land is claimed, never had possession of the property which he pretended to sell. He never seized it, except by giving notice of seizure. To constitute a valid seizure of a plantation, cultivated as such, the sheriff must take the property into his possession and custody.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. Plaintiff and appellee, *in propria persona*. Newton & Hall, for defendant and appellee. Bussey & Brigham, for warrantor.

MORGAN, J. On the sixteenth January, 1861, James Bell sold a certain tract of land, partly cultivated as a plantation, to E. P. Bell, his brother.

On the twenty-eighth January, 1866, Tully & Co. obtained judgment against James Bell for \$1936, with interest at eight per cent. per annum from twelfth January, 1862.

Execution issued on this judgment in February, 1868. The property sold by James to E. P. Bell was sold under this execution. Plaintiff bought it. His deed was recorded in November, 1871. On the twenty-third August, 1870, E. P. Bell resold the property to James Bell. On the sixth December, 1878, James Bell sold the same property to E. M. Johnson.

Two years elapsed after Tully & Co. obtained judgment before they attempted to execute it, and three years elapsed after the sale before the purchaser caused his deed to be recorded.

This suit was instituted in September, 1874, six years after the sale, by the plaintiff against Johnson. It is a petitory action, in which he charges that he has a better title than Johnson has. He alleges that

Morgan v. Johnson.

Johnson's title was illegally and fraudulently obtained. He must, of course, recover upon the strength of his own title. The difficulty in plaintiff's case is that he has no title.

It does not appear that the possession of either of the Bells, or of Johnson after them, was ever interfered with. The sheriff never had possession of the land which he pretended to sell. He never seized it, so far as this record discloses, except by giving notice of seizure.

To constitute a valid seizure of a plantation, cultivated as such, the sheriff must take the property into his possession and custody. 22 An. 207, *Kilbourne v. Frellsen*.

As there was no legal seizure, there was no sale. Morgan acquired nothing by this act of the sheriff, and he can claim nothing under it.

This view of the case renders it unnecessary that we should pass upon the many other questions raised by both parties.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

No. 586.

STATE OF LOUISIANA v. CHARLES CLINTON. FRANK MOREY, Intervenor.

This appeal was made returnable to this court on the first Monday of November, 1875, by the Superior District Court, parish of Orleans, and is made by law returnable at New Orleans. This court declines to try the case before the day it is made returnable, and at Monroe, a different place from that fixed by law, for the hearing of this appeal, even though the parties have consented to it.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. John Ray*, for petitioner and for intervenor, Frank Morey, appellant. *A. P. Field*, Attorney General, for defendant and appellee.

WYLY, J. The appeal taken in this case by the intervenor Frank Morey, from the judgment rendered on second July, 1875, was made returnable to this court on first Monday of November, 1875. It is from the Superior District Court, parish of Orleans, and is made returnable by law at New Orleans. This court declines to try the case before the day it is made returnable, and at a different place from that fixed by law for the hearing of this appeal, even though the parties have consented to it.

It is therefore ordered that the case be stricken from the docket of cases triable at this term, with leave to the appellant to file the record in the Supreme Court at New Orleans pursuant to the order of appeal.

State ex rel. Leonard, District Attorney, et al. v. Jackson.

No. 555.

THE STATE ex rel. J. E. LEONARD, District Attorney et al. v. ED. JACKSON.

M. A. Sweet was returned as elected recorder by the board created by law to ascertain that fact, and the commission issued by the Acting Governor is conclusive of that fact in all cases except where the election has been contested within the time fixed by law. Therefore the subsequent appointment of Jackson by the Governor was made in error, and is null and void.

Whether the oath of office of Sweet was taken and recorded in the office of the Secretary of State or not, did not authorize the Governor to treat the office as vacant.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. J. E. Leonard*, district attorney, *Sparrow & Montgomery*, for relator and appellant. *Montgomery & Delony*, for defendant and appellee.

LUDELING, C. J. M. A. Sweet was returned as elected by the returning board, and he was commissioned by Acting Governor Pinchback on the twenty-first December, 1872, as recorder of Carroll parish. He took the oath of office, gave bond, and entered upon the discharge of the duties of his office immediately thereafter, and he continued to act as such till April, 1875, when the defendant got possession of the office, building and archives by force, and he holds the same in defiance of the plaintiff's rights, under a commission issued by Governor Kellogg in March, 1875.

The term of the office of recorder is four years. M. A. Sweet was returned as elected by the board created by law to ascertain that fact, and the commission issued by the Acting Governor is conclusive of that fact in all cases, except where the election has been contested within the time fixed by law.

This is the well settled jurisprudence of this State. Therefore the appointment by the Governor of Jackson was made in error, and it is null and void.

Whether the oath of office of Sweet was taken and recorded in the office of the Secretary of State or not, did not authorize the Governor to treat the office as vacant. *Downs v. Towne*, 21 An. 490. It might perhaps authorize the district attorney to institute suit to have his office declared vacant, and treating this as such a suit, we have examined the evidence on that point. It shows that M. A. Sweet took the oath of office on or about the twenty-sixth of December, 1872, and that it was deposited in the clerk's office, where it was recorded, about three months thereafter. It also appears that a duplicate of said oath was forwarded to the Secretary of State, but it seems not to have been recorded in that office. We think the law has been substantially complied with.

State ex rel. Leonard, District Attorney, et al. v. Jackson.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the relator and against the defendant, decreeing M. A. Sweet to be recorder of the parish of Carroll, and to be put in possession thereof immediately. It is further decreed that M. A. Sweet's rights to recover the fees and perquisites of said office, collected by defendant, and the damages resulting from the wrongful acts of the defendant in taking possession of said office, be reserved to him, and that defendant pay costs of both courts.

No. 534.

S. S. HEARD v. B. P. PATTON.

It has often been held that a defendant appearing to except to the citation, can not at the same time urge any matter of defense.

The court *a qua* did not err in rejecting the document offered by defendant to show that the plaintiff was a bankrupt, and therefore not entitled to enforce certain judgments on which his suit is based, because the instrument was from the United States District Court of another State, and was not authenticated according to the act of Congress.

The defendant was without interest to contest with plaintiff, when he set up that the entries of his lands, against which the hypothecary action of the plaintiff is instituted, had been canceled, and said lands belonged to the United States. This defense puts him out of court.

The defendant's discharge in bankruptcy relieved him from personal liability, but it did not remove the mortgage which plaintiff had previously acquired on the lands. When the defendant, subsequent to his discharge, bought the lands which he had surrendered subject to the liens existing thereon, they remained liable to the hypothecary action which plaintiff has brought against them.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiff and appellee. *S. G. Parsons*, for defendant and appellant.

WYLY, J. This is a hypothecary action to enforce the judgments described in the petition against the lands therein described.

The court decreed the lands of defendant liable for two judgments for nine hundred dollars each, subject to the credits stated in the judgment.

The defendant appeals.

Defendant excepted to the service, but as the exception contained a plea amounting to an answer, it will not be noticed. It has often been held that a defendant appearing to except to the citation can not at the same time urge any matter of defense.

The court did not err in rejecting the document offered by defendant to show that plaintiff was a bankrupt, and therefore not entitled to enforce said judgments, because the instrument was from the United States District Court of another State, and it was not authenticated according to the act of Congress. 11 R. 417.

 Heard v. Patton.

The defendant was without interest to contest with plaintiff when he set up that the entries of his lands had been canceled, and they belonged to the United States. This defense puts him out of court. The defense that the consideration of the notes was slaves does not apply to the two judgments enforced by the decree of the judge *ex quo* against the lands in question, the notes upon which said judgments were based having no such consideration.

The defendant's discharge in bankruptcy relieved him from personal liability, but it did not remove the mortgage which plaintiff had previously acquired on these lands. When the defendant, subsequent to his discharge, bought the lands which he had surrendered, subject to the liens existing thereon, they remained liable to the hypothecary action which plaintiff has brought against them.

On the whole the defense is without a foundation.

Judgment affirmed.

 No. —.

THE CITIZENS' BANK OF LOUISIANA v. THE BOARD OF LIQUIDATION.

Appeals from the Superior District Court of New Orleans are returnable at New Orleans.

That court, therefore, was without authority to make this appeal returnable at Monroe.

Consent can not give jurisdiction, neither can consent change the law which designates the place where appeals shall be returnable.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. Pitot and G. L. Hall*, for plaintiff and appellant. *A. P. Field*, Attorney General, and *J. Q. A. Fellows*, for defendant and appellee.

MORGAN, J. Plaintiffs have appealed from a judgment of the Superior District Court of New Orleans. The case is not one which, by law, is returnable at any point where this court may be in session at the time a judgment complained of is rendered.

Appeals from the Superior District Court of New Orleans are returnable at New Orleans. That court, therefore, was without authority to make the appeal returnable here. Consent can not give jurisdiction. Neither can consent change the law which designates the place where appeals shall be returnable.

Of our own motion, therefore, it is ordered, adjudged and decreed that this record be stricken from the docket, reserving to the plaintiff the right to file the same in New Orleans.

LUDELING, C. J., dissenting. I dissent, because the nature of the case is such that it should be disposed of speedily. See act of 1875 amending funding bill.

The Mayor and Selectmen of the Town of Homer v. Blackburn.

No. 527.

THE MAYOR AND SELECTMEN OF THE TOWN OF HOMER v. JOHN B. BLACKBURN.

The mayor and selectmen of the town of Homer could not do any thing which they were not authorized to do by the statute from which they derived their powers, and this statute expressly prohibited them from imprisoning any person for any period beyond the time necessary for the offender to become sober, or until he should desist from violence. Therefore the ordinance which extends the imprisonment to ten days is illegal, and when the mayor sentenced the defendant to an indefinite imprisonment, that is, until he paid a certain fine, his judgment was doubly wrong, for it condemned under an illegal ordinance, and went much farther than the ordinance itself permits.

As the act of the Legislature under which the ordinance under consideration was enacted, was passed in 1874, its constitutionality must be tested by the constitution of 1868. Constructing together articles 73, 89, 94 of that constitution, it follows that the ordinance under which this action is brought, is illegal and unconstitutional, so far as it permits the mayor of Homer to imprison the defendant as he did, but not so far as it allows him to impose the fine which he fixed.

APPEAL from the Mayor's court of Homer, parish of Claiborne. *J. & J. W. Young, T. O. Egan*, for defendant and appellant. *David M. Callihan*, for plaintiffs and appellees.

MORGAN, J. The defendant, for an illegal violation of a municipal ordinance of the town of Homer, was fined twenty-five dollars, and ordered to be imprisoned until he paid the fine.

The ordinance authorized the judgment, and the ordinance was perhaps authorized by the statute which conferred certain powers upon the mayor and selectmen.

But the Legislature had no power to confer judicial authority upon these parties. That power is fixed by the constitution, and the Legislature can neither take from nor add to it. In this sense the first act passed in 1850, violated article 62 of the constitution of 1845; and the supplement thereof violated articles 78, 71 and 82 of the constitution of 1852.

Plaintiffs contend that article 94 of the constitution of 1868, confers this power, and therefore the defect of the former Legislature is cured. But we do not see how an act of the Legislature which violates an article of the constitution of 1852 can become constitutional because authorized by the constitution of 1868.

The constitutionality of a law must be tested by the constitution which was in force when the law was passed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed, and that there be judgment in favor of the defendant with costs in both courts.

ON REHEARING.

The fifth section of the act approved twenty-first March, 1874, p. 207, confers upon the mayor of the town of Homer all the powers and

The Mayor and Selectmen of the Town of Homer v. Blackburn.

duties of a justice of the peace for all civil and criminal matters originating within the limits of the corporation.

The same section gives to the mayor and selectmen the power to pass by-laws and ordinances not inconsistent with the laws and constitution of the United States and of this State, as they may deem proper, in relation to the good government, improvement and police regulation of the town, in all respects and particulars whatsoever, to impose such fines and penalties for a breach of their by-laws and ordinances as they may deem proper, not to exceed the sum of twenty-five dollars for any single offense, receivable before the mayor or any justice of the peace of the ward, under precisely such process, evidence and showing as other debts are recoverable, and no ordinance or by-laws shall be passed or enacted by the corporate authorities of said town of Homer imposing or locking any person up in any calaboose or jail for non-payment of a fine; provided, that any drunken or disorderly person disturbing the peace and refusing to be quiet or to leave the corporate limits of the town instantly, may, at the discretion of the mayor, be sent to the parish jail or town calaboose and locked up until he shall have become sober and quiet, when he may be fined in such sum as the mayor may deem just and proper, not to exceed the sum of twenty-five dollars, as hereinbefore provided for, which sum shall be collectible in the mode and manner already specified.

On the fifteenth August, 1871, the Mayor and selectmen of the town of Homer passed an ordinance by which it was declared that "any person who shall be guilty of loud and boisterous cursing and swearing or using obscene language in any place of public resort, or upon the public streets of Homer, or who shall be guilty of any riotous conduct calculated to disturb the peace and quiet of the town or any citizen thereof, or who shall be guilty of fighting, unless in self-defense, upon conviction thereof shall pay not less than five nor more than twenty-five dollars, or be imprisoned in the parish jail or town lockup not more than ten days, or both, at the discretion of the court."

The defendant was proceeded against for having violated this ordinance, and he was ordered by the mayor to pay a fine of twenty-five dollars and costs, and in default of payment to be imprisoned until the same was paid.

From this judgment he appeals. It is apparent from a mere reading of the statute under which the ordinance was framed that the mayor and selectmen exceeded their powers. They could not do anything which they were not authorized to do by the statute from which they derived their powers, and this statute expressly prohibited them from imprisoning any person for any period beyond the time necessary for the offender to become sober, or until he should desist from violence.

Here the period of imprisonment imposed by the mayor was absolutely without limit. If he did not pay the fine in twenty years he would, under the judgment, remain in jail for twenty years. In this the judgment violates the ordinance itself, which limits imprisonment to ten days. The judgment therefore is doubly wrong, for it condemns under an illegal ordinance, and goes much further than the ordinance itself permits.

As the act of the Legislature, under which the ordinance under consideration was enacted was passed in 1874, its constitutionality must be tested by the constitution of 1868. If article 73 of that constitution, which provides that the judicial power shall be vested in a Supreme Court, in district courts, in parish courts, and in justices of the peace, and the eighty-ninth article which declares that "justices of the peace shall be elected by the electors of each parish in the manner to be provided by the General Assembly," stood alone, the question might arise as to the power of the Legislature to confer judicial power upon the mayor of a town.

But article 94 of the constitution provides that "no judicial powers, except as committing magistrates in criminal cases, shall be conferred on any officers other than those mentioned in this title, except such as may be necessary in towns and cities, and the judicial powers of such officers shall not extend further than the cognizance of cases arising under the police regulations of town and cities in the State. Therefore, where it is necessary to confer judicial powers upon others besides those designated in the constitution, in towns and cities, with regard to cases under the police regulations of the towns and cities, the Legislature has the authority to confer the power. And as the law before us refers to officers of a town, and regards the police regulations of that town, it follows that our former judgment is partly right, and partly wrong. It is right when it declares that the ordinance under which this action is brought, in so far as it permits the mayor of Homer to imprison the defendant for an indefinite period, is illegal and unconstitutional. It is wrong when it declares that that portion of the ordinance which allows the mayor to impose a fine upon the defendant is illegal and unconstitutional.

It is therefore ordered, adjudged and decreed that our former judgment in this case be set aside. And it is now ordered, adjudged and decreed that the judgment in so far as it orders the defendant to be imprisoned until the judgment rendered against him and the costs are paid, be avoided, annulled and reversed; and that so far as it imposes a fine of twenty-five dollars and costs upon the defendant, it be affirmed, defendant paying the costs in the court below, plaintiff those of this appeal.

Succession of Gayle.

No. 567.

SUCCESSION OF W. H. GAYLE. Opposition of G. KING and others to final account of Administratrix.

The motion to dismiss the appeal because there is no day fixed for the return of the appeal, can not prevail. The appeal is made "returnable to the Supreme Court of the State of Louisiana at its next term, commencing in the city of Monroe on the first Monday of July, 1875." This was fixing the day with sufficient certainty.

After a wife has obtained a separation of property from her husband, and has executed it, and has assumed the administration of her estate, it would be a fraud upon the public to permit her to acquire a legal mortgage upon the property of the husband, acquired by him subsequent to the judgment of separation, by allowing him to manage her property and spend her money. He must be presumed to have acted as her agent, and as such he owes her an account of his administration, but his acts create no mortgage on his estate.

Mrs. Gayle, the administratrix, having occupied a house which was the separate property of her husband, and which belonged to his succession, must be charged with the rent as any third person would be.

Neither by separate or combined action can the administratrix and attorney of the succession impose an onerous charge upon an estate by the employment of counsel, when the estate is already provided with a competent legal adviser. If the administratrix chooses to employ additional counsel, she must pay him out of her own funds.

In matters of opposition to succession accounts all the parties are plaintiffs and defendants, and each opponent must make out his case by proper and sufficient proof.

The reinscription of a mortgage after the peremption, subsequent to the death of the mortgager, does not affect the property of the succession with a mortgage.

The opposition to the failure of the administratrix to the account for amount of notes given for the purchase of property sold on the Stevens plantation, must be maintained. The proposition that the balance due Mrs. Stevens for rent exceeds the amount of these notes, is inadmissible. The notes were given for property belonging to the succession. It was the duty of the administratrix to collect them, and to place the proceeds on her account, leaving it to the parties in interest to claim their right of preference over the proceeds.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J. Cobb & Gunby, John Ray*, for administratrix and appellee. *R. W. & R. Richardson, Morrison & Farmer, Robert J. Caldwell*, for opponents and appellants.

MORGAN, J. Appellee moves to dismiss the appeal on several grounds:

First—Because there is no day fixed for the return day of the appeal. The appeal is made "returnable to the Supreme Court of the State of Louisiana at its next term, commencing in the city of Monroe on the first Monday of July, 1875." Monroe is the place where, by law, the case under consideration is returnable, and the first Monday in July is the day upon which appeals returnable there are to be filed. When, therefore, the parish judge ordered the appeal to be returned here on the first Monday of July, 1875, he with sufficient certainty fixed the day upon which it was to be returned, and he fixed it properly.

Second—The evidence missing, if it be missing, would not affect the decision.

*Reversed
see
Pascals vs Folie
48 Am. 1229*

Succession of Gayle.

ON THE MERITS.

Swan opposes the account filed by the administratrix. He prays to be placed thereon as a judgment creditor for \$4050, with interest. He prays that the following items be stricken therefrom:

1. Claim of the administratrix	\$1,287 74
2. Fee allowed to Garrett, attorney.....	500 00
3. Fee allowed to Garrett & Garrett.....	500 00
4. Printing bill for briefs.....	98 50
5. Printing for the estate.....	188 25

S. H. Kennedy & Co. represent themselves to be judgment creditors, with a recognized privilege against the estate of Gayle, in the sum of \$7261 31, with eight per cent. interest thereon on \$6000 from December 1, 1867.

Schlessinger, in his own right and as executor of F. S. Schlessinger, claims to be a judgment creditor in the sum of \$5416 21, with eight per cent. interest from November 25, 1867, with a recognized privilege.

Gottlieb King claims to be a creditor for the sum of \$852 43, with eight per cent. interest from first February, 1872. He was cosurety with the deceased. Judgment was rendered against him for the whole amount, which he paid; \$852 47 is the half of the debt.

Together, Kennedy & Co., Schlessinger and King, charge that the administratrix is liable.

First—For lands in the parish of Morehouse, which were sold for \$153.

Second—Lands in the parish of Carroll, sold for \$203; besides other lands, the value of which is not given.

Third—For lands not accounted for in the parish of Richland, appraised at \$900.

Fourth—For a house and lot in Monroe, sold for \$5505, whereas she only charges herself with \$5456 50.

Fifth—For the difference between \$110 50 and \$72, proceeds of personal property.

Sixth—For accrued interest collected on the notes given at the credit sale of personal and movable property sold on eleventh January, 1868.

Seventh—For rent of house in Monroe, occupied by her for five years at \$75 per month, the house and lot having been Gayle's individual property.

Eighth—They deny that the item \$694 69, for city, parish and State taxes, is a privileged claim, and they further say that this question is *res judicata*.

Ninth—They oppose the item of \$188 25 for printing as exorbitant.

Succession of Gayle.

Tenth—They oppose the item of \$98 50 for printing briefs, denying that it is a legal charge against the estate, and if it be they deny that any privilege exists therefor.

Eleventh—They oppose the additional item of \$300, allowed to John Ray for professional services.

Twelfth—They oppose the reservation of \$100 for future costs.

Thirteenth—They oppose the two items, \$500 each, allowed to Isaiah Garrett, and to Garrett & Garrett, and deny that they are entitled to any privilege.

Fourteenth—They oppose the charge of \$297 77, commissions of administratrix, upon the ground that she has been grossly negligent and regardless of her duties, etc.

Fifteenth—They oppose her claim of \$4287 74, as a fraudulent device to shield the property of her late husband from the pursuit of his creditors.

Sixteenth—And to the last item they oppose the prescription of three, five and ten years.

N. King Knox is a judgment creditor for \$800, the judgment operating as a judicial mortgage from sixteenth April, 1867, with legal interest from first January, 1860. He claims that his mortgage is superior to all others except Gottlieb King and J. L. Hunsicker's, and that he is entitled to be paid out of the proceeds of the real estate belonging to the succession, in preference to all others. He opposes the mortgage claimed by Mrs. Gayle, and adopts the oppositions made to the account by Swan, King, and others.

He opposes Swan's claim as a mortgage and privilege debt, except from the date of its second inscription, the same not having been reinscribed within ten years from its first inscription.

Mrs. Mary Hunsicker, widow in community of J. L. Hunsicker, and as such administering his estate, and Ida V. Hunsicker, heir of J. L. Hunsicker, represents that J. L. Hunsicker is a judgment creditor for \$75, with eight per cent. interest from first January, 1861, which operated as a judicial mortgage on Gayle's estate from the twentieth April, 1866.

They claim preference over all other mortgage creditors except Gottlieb King, but say their mortgage is concurrent with his.

They adopt the oppositions of King, Sloan and other opponents. They oppose the claim of Sloan as a mortgage, except from its second inscription.

Let us first consider the oppositions that are made by all the creditors to the item of \$4287 74, which the administratrix claims. It results from moneys received by her husband, the proceeds of property belonging to her.

She was a judgment creditor of her husband. This judgment she executed. The community which had existed between them was dissolved. She then purchased property in her own name. This property she sold, and the husband received the proceeds, amounting to the sum claimed. She sets up a mortgage upon her husband's property to secure the return of this amount. We are called upon to determine whether her pretensions are well founded. And here she claims that her judgment of separation can not be attacked collaterally; that the time for attacking it has passed; and as the creditors who are now opposing her only became creditors after her mortgage attached, they can not complain, as it did them no injury.

The answer to this is: First, that it is not necessary to determine whether her judgment of separation of property was or not valid; and second, that the question is not whether her mortgage is superior to theirs, but whether she has any mortgage at all independent of her judgment of separation.

In our opinion, after a wife has obtained a separation of property from her husband, and has executed it, and has assumed the administration of her estate, it would be a fraud upon the public to permit her to acquire a legal mortgage upon the property of the husband acquired by him subsequent to the judgment of separation, by permitting him to manage her property and spend her money. He must be presumed to have acted as her agent, and as such owes her an account of his administration, but his acts create no mortgage on his estate. The fact that she has recorded the evidence of her claim does not give her a mortgage. It is the character of the recorded claim which constitutes the mortgage, and not the mere recording of the claim.

She is, however, an ordinary creditor for the amount received by her husband subsequent to her execution of the judgment which she obtained against him. The charges that her acts in this regard were a sham and a fraud, are not established. The oppositions are not sustained.

The next serious question raised by the oppositions is the amount which opponents say the administratrix should charge herself with for rent of a house which she occupied. This house belonged to the succession of her husband. It was his separate estate. It must be considered as much an independent piece of property as any other property which belonged to the estate upon which she was administering. If she choose to occupy it, she is chargeable with the rent thereof, just as any third person would be. It was not her property, and she can not use it without being made to pay for it. She occupied the house for five years. It is admitted that fifty dollars per month would have been an average rent for the house. She therefore owes the succession \$3000, with which her account must be charged.

Succession of Gayle.

The opposition to the fees paid, or proposed to be paid, to Isaiah Garrett \$500, and to Garrett & Garrett \$500, must be maintained.

The estate was represented in court by competent counsel. It was the duty of this counsel to appear for the succession in all matters in which it was interested. He is paid for the performance of this duty. If he chooses to delegate his power to a brother attorney, he must pay him. If the administratrix chooses to employ additional counsel, she must pay him. Neither by separate or combined action can the administratrix and attorney of the succession impose an onerous charge upon an estate by the employment of counsel when the estate is already provided with a competent legal adviser.

The difference between the amounts charged against herself for sales of certain property sold and the amounts which she received, forming items No. 1, 2 and 5 of the oppositions, is small, and occurs from the fact that she deducted from the gross proceeds the costs and gave only the net results of the sales. The opposition to these items must be dismissed.

No. 3—The land in Richland, for the value of which the administratrix is sought to be made liable, does not appear to have been sold. If it belongs to the succession it is still an asset, and the administratrix is not responsible for its value until it shall have been sold. This opposition must be dismissed.

No. 4—The difference between the apparent price of the house and land sold in Monroe and the sum accounted for is explained by the fact that a portion of the land sold belonged to another party. Deduction being made for the value of the property thus erroneously sold, and the amount accounted for, is correct. This opposition is dismissed.

No. 6—We are not informed what interest the administratrix received on account of accrued interest collected on the notes given in payment of property sold, and therefore can not say that she should be charged with any.

No. 7—This item of opposition has been passed upon.

No. 8—The taxes are upon property in different parishes, and those due are a privilege upon the lands which are liable to taxes in the parishes. The opposition which complains that the whole of the taxes due are privileged on all the property must be maintained.

No. 9—The opposition to this item, which is for printing, is dismissed. It is a privilege charge against the estate.

No. 10—The same may be said of this item.

No. 11—The opposition to the allowance of \$300 to John Ray, attorney, for services to the succession, is dismissed. The amount awarded to him in the succession is reasonable.

No. 12—The opposition to \$100 reserved for future costs is dismissed.

No. 13—The opposition to the fee allowed I. Garrett and Garrett & Garrett has already been passed upon.

No. 14—The opposition to the administratrix's claim for commissions is dismissed. We do not discover that she has done anything which should deprive her of them.

No. 15—The opposition to the claim of the administratrix for \$4287 74, claimed to be due by her husband, has been passed upon.

No. 16—The plea of prescription to the claim set up by the administratrix for \$4287 74, it is not necessary to consider in view of the decision upon the opposition to her claim.

The matters set up in the supplemental opposition of Swan have been disposed of by one witness in the oppositions heretofore considered.

Up to this point all the opponents have been attacking the administratrix's account. Now they turn upon each other, and each deny, in a great measure, the verity or priority of the claims advanced by the other. Combinedly they attack Swan's pretensions. Swan claims to be a creditor, with mortgage superior to all others, in the sum of \$4050, with interest. His mortgage is denied.

In support of his claim he has offered in evidence a judgment of the district court for the parish of Ouachita, decreeing him to be a creditor of the succession in the amount which he claims to be due. No answer has been made to this demand by the administratrix. None was necessary. Swan is an actor in his own behalf. In matters of opposition to succession accounts, all the parties are plaintiffs and defendants, and each opponent must make out his case by proper and sufficient proof. Now the judgment upon which Swan relies, as regards the mortgage, is against him; for it recognizes him only as an ordinary creditor, and expressly denies his right of mortgage upon the ground that it had not been reinscribed within ten years from its first inscription. This judgment was rendered on the nineteenth September, 1872. It has never been reversed or appealed from, that we can discover. It is therefore conclusive against him. There is another ground which is fatal to his pretensions. It is this: It is not denied that when reinscribed the mortgage had perempted. Now at the date of the reinscription Gayle was dead. The reinscription of a mortgage after peremption, subsequent to the death of the mortgager, does not affect the property of his succession with a mortgage. This renders it unnecessary for us to examine the bill of exceptions taken by him to the admission of certain evidence regarding the erasure of the mortgage. If we ruled out this testimony, his own evidence shows that he has no mortgage.

Succession of Gayle.

The supplemental opposition of Schlessinger & Co. and Kennedy & Co. to the failure of the administratrix to account for \$2175, amount of notes given for the purchase of property sold on the Stevens' plantation, must be maintained. In the brief it is claimed that the balance due Mrs. Stevens for rent exceeds the amount of these notes. But this proposition is inadmissible. The notes were given for property belonging to the succession. It was the duty of the administratrix to collect them, and to place the proceeds on her account, leaving it to the parties in interest to claim their right of preference over the proceeds.

Gottlieb King was bound with Gayle for a debt due by Richardson. King, under judgment, which was recorded on April 13, 1866, paid the debt. Gayle then became his debtor for the half thereof, and he was subrogated of right to the common judgment creditor against Gayle. The amount due is \$852 43 with eight per cent. interest from first February, 1872.

N. H. Knox is a creditor for \$800, with eight per cent. interest from first January, 1860, with judicial mortgage from sixteenth April, 1867.

The Hunsickers are judgment creditors for \$75, with interest at eight per cent. from January 1, 1861, with judicial mortgage from twentieth April, 1866.

Kennedy & Co. and Schlessinger & Co., the amount of whose claims are not disputed, assert no privilege or mortgage upon the proceeds of real estate, but rely upon the rejection of claims alleged to have been erroneously paid as privileged claims by the administratrix and their opposition in common with other creditors to the account, which, if sustained, will give them an additional pro rata as ordinary creditors in proportion to the amount fixed on their respective claims.

They are special privileged creditors on the crops raised, respectively, upon the Stevens and McGuire places, recognized as such by judgment of this court, and their pretensions in regard to these matters are not contested.

Kennedy & Co.'s claim is \$7261, with eight per cent. interest on \$6000 from seventeenth December, 1867. Schlessinger & Co.'s claim is \$5416 21 with eight per cent. interest from twenty-fifth November, 1867.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be amended as follows :

It is ordered that the account of the administratrix be charged, first, with the rent of house occupied by her, \$3000; second, with the proceeds of sale of property on the Stevens' place, \$2175.

It is further ordered that the oppositions to the following items charged as privileges and mortgages upon the property of the estate

be maintained, and that they be disallowed: First, the item claimed by the administratrix on account of her alleged legal mortgage, \$4237 74; second, the item allowed to I. Garrett, \$500; third, the item allowed to Garrett & Garrett, \$500.

It is further ordered that the following oppositions to items charged on the account as privileged debts, to wit: Printing briefs, \$98; printing for the succession, \$188 25; John Ray, attorney for succession, \$300; to amount reserved for future costs, \$100, be dismissed. That the opposition to the privilege claim for taxes, in so far as the entire estate is held to pay the entire tax, is maintained—the taxes in each parish to form a separate privilege against the proceeds of the property returned in each parish against which it is claimed.

It is further ordered, adjudged and decreed that the oppositions claiming amounts alleged to be due on lands sold in the parishes of Carroll, Morehouse and Ouachita, be dismissed. The oppositions to amount of accrued interest received by the administratrix on notes given in payment of property, is dismissed.

It is further ordered that the opposition to the commissions of the administratrix be dismissed.

It is further ordered that the opposition of Swan be maintained in so far as to place him on the account as an ordinary creditor for the amount claimed by him \$6080, with interest as claimed, and that it be dismissed upon his claim to a right of mortgage.

It is further ordered that the opposition of Mr. and Mrs. Hunsicker be maintained, and that they be placed on the tableau as creditors, with mortgage on the real estate belonging to the succession, and to be paid out of the proceeds thereof, for seventy-five dollars, with interest at eight per cent. from first January, 1861. That the opposition of N. King Knox be maintained, and that he be placed on the tableau as a judgment creditor in the sum of \$800 with interest at eight per cent. from first January, 1860, with judicial mortgage upon the real estate of the succession, and to be paid out of the proceeds thereof.

It is further ordered that the opposition of Gottlieb King be maintained, and that he be placed on the tableau as a judgment creditor for \$852 43, with eight per cent. interest from first February, 1872, with judicial mortgage upon the real estate of the succession or the proceeds of the sale thereof, his judgment to rank from the thirteenth April, 1866.

It is further ordered that the judgments of King and Hunsicker be paid concurrently and prior to the other judgment creditors.

It is further ordered, adjudged and decreed that the opposition of Kennedy & Co. be maintained, and that they be placed on the tableau

Succession of Gayle.

as creditors of the succession in the sum of \$7261 31, with interest on \$6000 from first December, 1867, with privilege on the proceeds of crop made on the Island plantation, the property of Mrs. Mary Stevens, and that as to the balance of their claim they be paid pro rata with the ordinary creditors.

It is further ordered that the opposition of Schlessinger in his own name and as the representative of the late commercial house of Schlessinger & Co. be maintained, and that he be placed on the tableau in his capacities aforesaid as a creditor of the succession in the sum of \$5416 21, with privilege on the proceeds of the crops grown on the McGuire plantation, and that for the balance of their claim they be paid pro rata with the ordinary creditors.

It is ordered that Mrs. Mary J. Gayle be recognized as a mortgage creditor for the amount remaining due on her judgment of separation of property to rank as stated in the judgment, and that for the balance of her claim, as it appears on the tableau, she be recognized as an ordinary creditor, to be paid pro rata with the other ordinary creditors of the estate; and as thus amended the account of the administratrix be approved and homologated, and the funds distributed accordingly.

LUDELING, C. J., *dissenting*. I dissent from the views of the majority of the court, on the following points:

First—I do not think the administratrix is chargeable for the rental of property of the succession, which was not rented. The fact that she occupied the dwelling house, in which the deceased lived when he died, till its sale, does not change the rule that an administrator is not bound to lease the property of an estate.

Second—The fees of I. Garrett and of Garrett & Garrett, should be allowed as a credit to the administratrix. They were for services in suits against the succession. The services were necessary; they were rendered. I know of no law that requires an administrator to engage the services of only one attorney, during the course of the administration, nor do I believe that such would, in all cases, be to the interest of a succession.

In other respects I concur in the conclusions reached by the court.

Rehearing refused.

No. 546.

LEVY & SUGAR v. COWAN & MAYO AND MAYO & HODGE. COLLINS,
KNOX et al. garnishees.

Against a succession a writ of *feri facias* can not issue, nor can a seizure thereunder be made by garnishment process.

The specific credits of a partnership, as in this case, can not be seized under execution against one of the partners, or the surviving partner. The entire interest of a partner may be seized and sold, but no specific asset, credit or property of the partnership is liable to seizure under execution against one of the partners.

The appellant who shows title to the property in dispute can make any objection necessary to protect his interest.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiffs and appellees. *Todd & Brigham*, for garnishees and appellants.

WYLY, J. Plaintiffs, judgment creditors of defendants, issued execution on their judgment in the Fourth District Court, parish of Orleans, and they seized by garnishment process certain credits of said firms in the hands of the garnishees herein. Long before this execution issued Mayo, one of the partners in defendants' firm, died and all his assets, notes and accounts and the assets, notes and accounts of these firms were sold by order of the Second District Court, parish of Orleans, the court having jurisdiction of Mayo's succession, and T. H. Higginbotham purchased the same. He intervened in the court below and moved to set aside plaintiffs' seizure on several grounds, the most important being :

First—As Mayo was dead and his succession in charge of the Second District Court no valid execution could issue.

Second—No valid seizure can be made of a particular asset, note or account belonging to a partnership on an execution directed against one of the partners or the surviving partner.

From the judgment against certain of the parties garnishee Higginbotham has appealed. The record shows that he purchased the property in dispute at the sale ordered by the Second District Court, and he asserts his right as owner of property exceeding in value five hundred dollars.

The motion to dismiss his appeal for want of an appealable interest is denied.

On the merits, the case is clearly with the appellant. Against a succession a writ of *feri facias* can not issue, nor can a seizure thereunder be made by garnishment process. The specific credits of a partnership, as in this case, can not be seized under execution against one of the partners or the surviving partner. The entire interest of a partner may be seized and sold, but no specific asset, credit or property of the partnership is liable to seizure under execution against one

 Levy & Sugar v. Cowan & Mayo and Mayo & Hodge.

of the partners. Therefore, the seizure, so far as relates to Mayo, is void, because his succession is not liable to seizure under *feri facias* so far as it relates to his surviving partners, the things seized belonging to the said firms, the property in the hands of the garnishees herein was not liable to seizure by plaintiffs. The appellant who shows title to the property in dispute can make any objection necessary to protect his interest.

It is therefore ordered that the judgment herein be annulled, and it is decreed that plaintiffs take nothing by their seizure, and their garnishment proceedings herein be set aside at their costs in both courts.

No. 549.

ANNIE ALEXANDER AND HUSBAND v. B. SILBERNAGEL et al.

It seems settled by our jurisprudence that where no law authorizes the execution of a judicial bond, no force can be given to it. The order of the judge authorizing the intervenors in this case to release property under sequestration by executing a bond, gives no validity to the bond, because there is no law authorizing intervenors to release property under sequestration by furnishing bond.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.* Jury trial. *S. G. Parsons*, for plaintiff and appellee. *Todd & Brigham*, for defendants and appellants.

TALIAFERRO, J. It was seen by the statement of facts in the decree in the case of *Annie Alexander and husband v. J. G. Felton, et al., H. Tully & Co., and Silbernagel, Starnsey & Co., intervenors*, just read, that Silbernagel, Starnsey & Co., intervenors in that case, released under bond in the sum of \$1300, the estimated value of one-third of the crop of cotton and corn, the product of the crop of the year 1867, on the Wells plantation, the entire crop being under sequestration at the suit of plaintiff against Felton and others, lessees.

In this case, the plaintiff brings suit against Silbernagel, Starnsey & Co., on the aforesaid bond of release.

The defendants excepted mainly on the ground that the bond sued upon is null and void because it was not executed in conformity with law, and there being no law authorizing intervenors to execute bonds for the release of property sequestered, the plaintiff can not recover on the bond sued upon. The exception was referred to the merits. Defendants subsequently filed their answer, setting up various grounds of defense.

The plaintiff had judgment for \$1090, with interest, and the defendants have appealed.

It becomes unnecessary from the decision to be rendered in this case

to examine the bills of exception found in the record. The exception to the validity of the bond must be sustained. It seems settled by our jurisprudence that where no law authorizes the execution of a judicial bond no force can be given to it. The order of the judge authorizing the intervenors in this case to release property under sequestration by executing a bond, gives no validity to the bond because there is no law authorizing intervenors to release property under sequestration by furnishing bond. In the case of *Danson v. Morton & Williamson*, 22 An. 535, where an intervenor had given bond to release an attachment (and the same principle applies to sequestration), this court said: "Without a law authorizing the release of property under attachment, on the bond of an intervenor, it can not fairly be said, that such a bond is a judicial bond, which must be construed with reference to the law in pursuance of which it was given." See case of *Benham and others v. Collins, sheriff, et al.* 23 An. 222, and cases there cited.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed. It is further ordered that this case be dismissed at plaintiff's costs.

No. 552.

WALKER & VAUGHT v. G. W. KIMBROUGH, Administrator, et al.

The plaintiffs sue to annul a probate sale on the ground of fraud and collusion between the administrator and the purchasers to sacrifice the property and evade the pursuit of the creditors of the succession.

The exception that a ratification of the sale by plaintiffs resulted from the filing by them of a third opposition, and claiming the proceeds, is well taken. The purchasers bought no doubt under what probably appeared to them regular proceedings and apparently in good faith. They should be protected.

The objection that the land was not divided into lots and sold in lots, as prescribed by law, is without much force. No survey was made, but the lots were sufficiently designated by means of the map of the official United States survey and sold in portions easily ascertainable. No such illegality thereby arose as to work nullity of the sale.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray J. Todd & Brigham*, for plaintiffs and appellants. *O. T. Dunn, D. C. Morgan*, for defendants and appellees.

TALIAFERRO, J. The plaintiffs sue to annul a probate sale. They allege fraud and collusion between the administrators and the purchasers to sacrifice the property and evade the pursuit of the creditors of the succession. They allege that a second appraisement of the property was illegally obtained for the purpose of having the property appraised at a low valuation, and that advantage was taken of the time of the year when money in the country is usually scarce to have

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the sale made and of a place for making it where there would be but few bidders and but little opposition. Walker & Vaught were creditors of Ward. During his life time they proceeded by executory process to enforce a mortgage which they claimed to have against certain lands of their debtor. Ward enjoined the proceeding, and during the pendency of the injunction died, and the suit was continued by his administrator. The judgment of the district court dissolved the injunction, but this judgment was reversed on appeal. A suit *via ordinaria* was then brought to enforce the mortgage debt. There was judgment rendered ordering the sale of the land. Under this decree the land was seized, but subsequent to the seizure it was determined on appeal that there was no mortgage. Before, however, this decision was rendered the land was advertised for sale by the administrator under an order purporting to have been obtained by him in 1869, but which had been suspended by injunction. Walker & Vaught got out a third opposition and claimed the proceeds of the land. The sale was made, but after the decree of the appellate court that no mortgage existed, the third opposition was dismissed and the proceedings seem to have been discontinued. It seems that in March, 1871, an order of sale of the property was rendered on application of the administrator by the probate court of the parish of Morehouse, and that a sale was made under this order by the sheriff. It is this sale, which on the grounds before alleged, the plaintiffs seek to annul. Nearly two years having elapsed since the first inventory was made, and that having been destroyed by the burning of the parish records, the administrator obtained an order for a new inventory and appraisement which was made in July, 1871.

The defendants filed an exception to the jurisdiction of the district court, in which this suit was brought, as to that part of the action which seeks to attack the judgment of the probate court ordering the sale of the land; that plaintiffs were parties to that judgment, and that more than twelve months having elapsed without an appeal being taken from it, it has become *res adjudicata*; that plaintiffs ratified the sale by filing, previous to the sale, a third opposition claiming the proceeds of the land, and that they were thereby estopped from attacking the sale. 3 An. 648; 2 An. 454.

But the plaintiffs contend that the irregularities of which they complain occurred after they had filed their opposition and before the sale. The opposition was filed on the third July, 1871, the inventory made on the seventh of that month, and the first sale on the tenth of the month.

The purchasers except further that they have paid the price of adjudication as shown by the proces verbal of the sale in evidence, and

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that the purchase price nor any part thereof has been paid or tendered to them by the plaintiffs or any other person.

We are not induced to believe the plaintiffs have made out their case. The exception that a ratification of the sale by plaintiffs resulted from the filing by them of a third opposition, and claiming the proceeds, we think is well taken.

We see no illegality under the facts shown of the procurement of a second inventory and appraisement. The reduced price at which the lands were appraised at the last inventory, compared with their valuation by the first inventory taken two years before, may have resulted from the great falling off in value of real estate in this country. We have examined the evidence with considerable care, and although a few circumstances are shown that might excite some suspicion as to the entire fairness of the transaction, still we find nothing that establishes clearly and satisfactorily collusion and fraud, and especially on the part of the purchasers. They bought no doubt under what probably appeared to them regular proceedings and apparently in good faith; they should be protected.

The objection that the land was not divided into lots and sold in lots, as prescribed by law is, we think, without much force. No survey was made, but the lots were sufficiently designated by means of the map of the official United States survey and sold in portions easily ascertainable. No such illegality thereby arose as to work nullity of the sale.

It is therefore ordered and decreed that the judgment of the district court be affirmed with costs.

540.

SUCCESSION OF GEORGE W. RAWLS—Opposition to Tableau of Debts.

The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor, and those to secure the payment of expenses incurred in selling the property.

A PPEAL from the Parish Court, parish of Webster. *Franks, J. J. D. Watkins*, for administratrix and appellee. *L. B. Watkins*, for opponent and appellant.

LUDELING, C. J. The insolvent succession of George W. Rawls was opened in the parish of Webster, his surviving wife administered the estate and filed a tableau of debts, on which she placed herself as a privileged creditor for \$1000, under the widow's homestead act of 1852, No. 255.

Her claim is opposed on the grounds that at the time Rawls died he

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did not reside in Louisiana; that one of the creditors has a privilege on the buildings for materials furnished.

The evidence shows that Rawls had resided in Louisiana many years and up to within about three months before his death; that he left the State, probably with the intention of abandoning his wife, and that he died in St. Louis shortly after this. The wife always resided in Louisiana, where she was married; nor is it shown that Rawls ever acquired a domicile any where else.

The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor and those to secure the payment of expenses incurred in selling the property. C. C. 3252.

The motion to dismiss the appeal for want of a bond, in favor of the clerk, because the same person is clerk of the district court, is frivolous.

It is ordered that the judgment of the parish court be affirmed with costs of appeal.

No. 533.

L. H. GARDNER & Co. v. J. D. MAXWELL.

One holding a note as collateral security or as a pledge, to the extent of his debt, is the owner of the obligation for all practical purposes. It is not shown, in this case, that the debt to be secured is less than the amount of the note, even if it had been shown that plaintiffs held it as a pledge.

The note being negotiable and having been acquired before maturity by the plaintiffs, the equities between the original parties can not be noticed in this suit. When one of the parties must bear a loss, he who has made it possible must suffer.

In this instance, the mortgage is accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the obligation; and it follows the principal obligation, like a shadow follows its substance.

A mortgage may be given for an obligation which has not yet risen into existence, and the provision of law which says "that the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it," applies only to cases between the parties to the contract, or in which the principal obligation is not negotiable.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.* Jury trial. *S. G. Parsons*, for plaintiffs and appellants. *D. C. Morgan, Newton & Hall*, for defendant and appellee.

LUDELING, C. J. The plaintiffs are the indorsees of a note for \$5000, which they allege they acquired before maturity, in good faith and in due course of business, and they sue the maker thereof for its amount.

The defense is that the note was executed in favor of F. W. Michoux, for supplies advanced and to be advanced, to defendant; that the advances amount to \$1154 12, and that the balance of the note is with-

out consideration. The note is secured by a mortgage and is paraphed *ne varietur* by the recorder. The case was tried by a jury, who rendered a verdict in favor of plaintiffs for \$1094 12, without a mortgage, and plaintiffs appealed.

It is contended that the plaintiffs are only the pledgees of the note and not the owners thereof. One holding a note as collateral security or as a pledge, to the extent of his debt, is the owner of the obligation for all practical purposes. It is not shown, in this case, that the debt to be secured is less than the amount of the note, even if it had been shown that plaintiffs held it as a pledge.

The note, being negotiable and having been acquired before maturity by the plaintiffs, the equities between the original parties can not be noticed in this suit. Where one of two parties must bear a loss, he who has made the loss possible, must suffer. The mortgage is accessory to a principal obligation, which it is designed to strengthen, and of which it is to secure the execution. C. C. 3284. And it follows, the principal obligation, like a shadow follows its substance.

The defendant admits the rule, that equities between the parties can not be urged against an innocent purchaser of commercial paper, acquired before maturity; but he says that rule does not apply in such a case as this, because the note is paraphed *ne varietur* by the notary, and that charged him with notice, and that the act of mortgage, in Morehouse parish, showed that the note was for advances made and to be made. If this were true, it would result that mortgage notes or bonds are not negotiable; that the security, which is intended to give them value in the commercial world, destroyed their negotiability. The statement of the proposition shows its fallacy. The Civil Code declares that "a mortgage may be given for an obligation, which has not yet risen into existence." Art. 3292; 10 R. 383. And 3293, which says "the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it," applies to cases between the parties to the contract, or in which the principal obligation is not negotiable.

The plaintiffs, however, have only asked to have the mortgage recognized to the extent of \$3664 12, with interest from first May, 1873.

It is therefore ordered and adjudged that the judgment of the district court be annulled, that the verdict be set aside, and that there be judgment in favor of the plaintiffs and against the defendant for five thousand dollars, with eight per cent. interest per annum from the first of December, 1873, and costs of both courts; and that the mortgage referred to in the petition on the property therein described be recognized and made executory to the amount of \$3664 12, with eight per cent. per annum interest from first May, 1873.

Robertine Green v. The Baptist Church of Shreveport.

No. 575.

ROBERTINE GREEN v. THE BAPTIST CHURCH OF SHREVEPORT.

In this petitory action plaintiff claims that her posthumous birth destroyed her father's will; that the executor became thereby incapable to act; and that the sale made by him, as such, conveyed no title to the purchaser, who subsequently transferred it to the defendant.

Prima facie, the title acquired by the first purchaser was a good one. The property had been sold under an order of a competent court, made at the instance of one apparently authorized to apply for it. Purchasers are not bound, at their peril, to inquire, when property is advertised for sale by an executor, whether any thing has occurred, outside of court, to destroy the will under which he is acting.

Besides, the succession of plaintiff's father being insolvent, and the property which she now claims having been applied, as was proper, to the payment of his debts, it is not seen how she has been injured by the sale of which she complains.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. Fuqua, Calliham and Seay, for plaintiff and appellant. Nutt & Leonard, for defendant and appellee.

MORGAN, J. Plaintiff's father, Robert Green, died in October, 1854. He constituted his wife Lizzie H. Green, his universal legatee, and appointed John J. Green his testamentary executor, who qualified as such. The property now in contest formed part of his succession.

In February, 1855, the plaintiff was born. She is the issue of the marriage of Robert Green and Lizzie H. Green. At the time of her father's death she was "*en ventre sa mère*."

In June, 1856, the lots in question were sold. The sale was provoked by the executor. It was made under an order of court, and by auction.

Plaintiff claims that her birth destroyed her father's will; that the executor became thereby without power to act, and that the sale made by him conveyed no title.

It is in evidence that Robert Green died insolvent. It is admitted that the proceeds of the property went toward the payment of his debts.

Prima facie, the title acquired by the first purchaser was a good one. The property had been sold under an order of a competent court, made at the instance of one apparently authorized to apply for it. The records of the country showed that the executor was exercising the functions of his office at the time he asked for the order of sale. Purchasers are not bound, at their peril, to inquire, when property is advertised for sale by an executor, whether any thing has occurred outside of court; to destroy the will under which he is acting.

Besides, her father's succession being insolvent, and the property which she now claims having been applied, as was proper, to the payment of his debts, we do not see how she has been injured by the sale of which she complains.

The moral of her position is that the purchasers of her father's property shall pay his debts, and the property itself be returned to her. To this we can not assent.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed.

LUDELING, C. J., *dissenting*. This is a petitory action by the heir of Robert Green. The defense is that the defendant holds the property by mesne conveyances from the purchaser at a probate sale of the succession of Robert Green.

The sale was provoked and made by one who acted as the executor of the last will of Robert Green. At the time of the sale, the will, which appointed him executor, had been destroyed by the birth of a legitimate child of the testator subsequent to its date. "The testament falls by the birth of legitimate children of the testator posterior to its date." C. C. 1705. After the birth of the child there was no testament, and consequently no executor of Robert Green, deceased. And all the acts of said pretended executor were absolutely null. 2 R. 258; 3 An. 271; 8 An. 378; 6 How. 550.

Suppose a mere intermeddler, representing himself to be executor, had obtained an order to sell succession property and had made the sale; could it be seriously pretended that such a sale could be held to be valid? I imagine not.

It is contended, however, that John J. Green was acting under an appointment recognized by a court under an order of sale granted by a court of competent jurisdiction, and that therefore the sale was valid. The will having ceased to have validity after the birth of the child, *ipso facto*, all who dealt with him, were bound to inquire, if he filled the office legally. Otherwise the provisions of article 1705 is meaningless. J. J. Green had no right to ask for the order, and the court erred in making it, and it was without power or jurisdiction to authorize him, a stranger to the estate, to make the sale. The order itself was a nullity. "*Quod nullum est, nullum effectum producit.*"

The rule that a purchaser at a judicial sale is protected by the judgment of a court, has this extent only, that the innocent purchaser is protected from irregularities which precede the judgment. 23 An. 446. It has no application to this case, for the plaintiff does not complain of mere want of formalities preceding the order of sale; but of the order itself as null and void. The complaint is that succession property, the heir to which was a minor, was sold under an order granted when both the succession and the minor were unrepresented, and at the instance of a total stranger to the succession. There is no excep-

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tion in this case that the minor has not offered to return the price of the property which may have gone to pay the debts of the succession ; and therefore I think there should be judgment in her favor for the land, and a writ of possession to issue only, when she reimbursed to defendant the portion of the price which went to pay the debts of the succession. For the foregoing reasons I dissent.

Rehearing refused.

No. 586.

R. H. LINDSAY v. W. A. WRIGHT.

This is an action of boundary. The judge *a quo* erred in receiving the report of the surveyors, which was not made in conformity to law. Revised Code, 834.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Nutt & Leonard*, for plaintiff and appellee. *Land & Taylor*, for defendant and appellant.

WYLY, J. This is an action of boundary. The defendant prayed for a survey and the court commissioned Watts, Levenworth, and Parsons, surveyors, to make the survey. Their reports were objected to and a new survey was ordered. The court directed surveyors Melvin, DeVoe, and Crain to make a survey, and in the order required them "to give due notice to the parties in writing of the time and place when the survey will be made by you, and you will call upon them for their title deeds and make due return," etc.

At the trial defendant excepted to the reports of these surveyors, because the process verbal of the survey does not show that the parties in interest were notified in writing of the time and place of making the survey. The judgment of the court was based on the report of surveyors Melvin and DeVoe, and from it the defendant appeals.

The report of these surveyors should not have been received. "Whenever any surveyor is called on to fix the limits between adjacent estates, it is his duty to notify in writing the owners interested therein to be present at the work, if they think proper, and to inform them of the day and hour when he will proceed to fix the limits; and he is bound in his process verbal to make mention of the notice he may thus have given of the names of the parties notified and of the date of the notice. * * * Revised Code, 834.

It is therefore ordered that the judgment herein be set aside, and it is decreed that this case be remanded for new trial, and to be proceeded in according to the views herein expressed, appellee paying costs of appeal.

Kimbrough, Administrator, v. Walker, Vaught, and Todd.

No. 554.

G. W. KIMBROUGH, Administrator, v. WALKER and VAUGHT and
R. B. TODD.

An injunction, which was subsequently dissolved, was obtained in the parish court of the parish of Morehouse, by Walker and Vaught, and an injunction bond for \$500 given, with R. B. Todd as security. This suit is to make both principals and surety responsible in damages for the injunction wrongfully taken, without regard to the amount specified in the bond.

As to Walker and Vaught, the principals, the plea to the jurisdiction of the court was properly maintained. They must be sued at their domicile, which is New Orleans.

As to the security, who resides in the parish, the plea to the jurisdiction *ratione materie* is not tenable. It is the demand which must test the jurisdiction, and the demand in this case is over \$7000, the plaintiff contending that the liability of the security is not limited to the bond.

The plea of *res judicata* is not tenable, because in the cases cited and in which it is alleged that the cause of action now presented had been pleaded, nothing was said in regard to damages, as that question was not properly at issue.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. C. T. Dunn, for plaintiff and appellant. Todd & Brigham, for defendants and appellees.

LUDELING, C. J. This is a suit for seven thousand two hundred and sixty-two dollars, for damages for the wrongful suing out of an injunction by Walker and Vaught, residents of New Orleans, in 1869, to prevent the sale of property belonging to the succession of W. B. Ward.

The injunction was obtained in the parish court, and an injunction bond for \$500 was given with R. B. Todd as security. This suit is to make both principals and surety responsible for said damages, without regard to the amount specified in the bond.

The defendant pleaded to the jurisdiction of the court *ratione personæ* as to the principals, and *ratione materie* as to the security. They further pleaded *res judicata*. These pleas were sustained, and the plaintiff has appealed.

As to Walker and Vaught, the plea to the jurisdiction of the court was properly maintained. They must be sued at their domicile.

As to the surety, the plea is not tenable; it is the demand which must test the jurisdiction of the court *ratione materie*. The demand in this case is over \$7000, the plaintiff contending that the liability of the surety for damages is not limited to the bond. It is evident that this question, thus raised, could never be decided if the plea be good, for no court would have original jurisdiction in the matter, if the district court has not.

The plea of *res judicata* is not tenable.

Nothing was said in regard to damages in the cases in which the injunctions were dissolved, because the question of damages was not properly at issue in said cases. 1 Rob. 142; 9 An. 303.

Kimbrough, Administrator, v. Walker, Vaught, and Todd.

It is therefore ordered that the judgment of the district court be reversed, and that there be judgment dismissing the plaintiff's demand against Walker and Vaught, for want of jurisdiction of the court *a qua*, with costs; and that the case be remanded to the court of the first instance, to be proceeded with according to law against the defendant Robert B. Todd, the appellee Todd to pay the costs of appeal.

WILF, J., *dissenting*. Walker and Vaught, alleging that they were mortgage creditors of the succession of W. R. Ward, and were proceeding to foreclose their mortgage in the district court, enjoined the sale of the mortgaged property ordered by the parish court on fifteenth December, 1869, R. B. Todd being their surety on the injunction bond for five hundred dollars. It was subsequently determined by this court on the trial of said injunction, that they were not mortgage creditors, but ordinary creditors of said succession; that they had no right to enforce the mortgage set up by them, and the injunction was dissolved, nothing being said in the decree in reference to damages which were claimed in that suit. Plaintiff, the administrator of the succession of Ward, now sues for \$7500 damages, which he alleges the succession incurred on account of the wrongful issuing of said injunction, said damages consisting of \$500 attorney's fees and \$7000 loss sustained by said succession in the depreciation of the value of the mortgaged property pending the injunction, which suspended the sale thereof from December, 1869, till August, 1871.

Plaintiff, in his brief, bases his action for damages on the injunction bond, and contends that although said bond is only for five hundred dollars, the surety is liable *in solido* with his principals for whatever damages plaintiff has sustained on account of said injunction. I agree with the majority of the court that the suit must be dismissed as to Walker and Vaught, citizens of New Orleans, for want of jurisdiction *ratione personarum*. They must be sued before their own judge. C. P. 162. But I differ with the majority of the court in regard to the jurisdiction of the court *a qua* as to Todd, the surety on the injunction bond. As to him, I think the district court was without jurisdiction *ratione materiae*, his obligation on the bond (the matter in dispute) being less than \$500.

The plaintiff can not be serious in alleging that the surety on an injunction bond is liable beyond the amount thereof in a suit based, as he contends in his brief, on the bond. Indeed, the bond evidences the only obligation of Todd, the surety, and it alone gives any cause of action against him. Without the bond Todd was a stranger to the suit which caused the damages of which plaintiff complains. Here

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then is a suit based on a bond for \$500, and the plaintiff proposes to give the district court jurisdiction by a simple allegation that Todd, the surety, owes him on said bond \$7500. The demand beyond \$500 is purely fictitious, and ought to be entitled to no more weight than a like allegation would have in a suit based on a note for \$500.

It will not be pretended that if Mr. Todd were sued upon a note for \$500 the attorney for plaintiff could give the district court jurisdiction by simply alleging that he owed on said note \$7500, or any other sum in excess of what appeared on the note itself. But it is gravely argued that as plaintiff claims that Todd owes him on the \$500 bond \$7500, the parish court was without jurisdiction to determine that question, that is, whether he owes on the bond more than the amount thereof. The same might with equal apparent seriousness be said of a suit on a note for \$500 where the plaintiff would claim \$7500. In my opinion the argument is frivolous. It was impossible to give the district court jurisdiction of a suit against a surety on a bond for \$500, simply because ingenious counsel in framing the petition assert that he owes on said bond more than ten times the amount thereof, or \$7500. Courts deal with substances not shadows—realities, not fictions. I think the jurisdiction of the court, as fixed in the constitution, should not be altered by such a shallow device. I therefore dissent.

Rehearing refused.

No. 528.

THE MAYOR AND SELECTMEN OF THE TOWN OF HOMER v. T. S. MERRITT et als.

The plea that the securities are not bound because their principal was not legally collector, and because much of the money collected as licenses and fines had not been legally assessed, can not be maintained.

These questions can not be raised in this collateral manner. It is a fact that the principal on the bond did act as collector, at least under color of authority, and that he did collect the licenses and fines imposed by those who were acting under color of authority. He must account for the moneys collected by him, even though unduly collected, and the sureties bound themselves to do so if he did not.

There is no merit in the defense that the sureties are bound only for such moneys as the principal collected during the first month of the term of his office, as he was required by law to make monthly settlements. It is evident that a violation of duty by the principal, can be no excuse for the sureties, who are bound for the consequences of all violations of his duties.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble*, J. Jury trial. *Egan & Hayes*, for plaintiffs and appellees. *J. & J. W. Young*, for defendants and appellants.

LUDELING, C. J. The plaintiffs sue the principal and his sureties on a bond given as collector of the town of Homer, the principal having embezzled the moneys collected by him.

The Mayor and Selectmen of the Town of Homer v. Merritt et als.

The principal defenses are, that the securities are not bound for licenses and fines collected by their principal, which were illegally assessed; and that their principal was not legally elected collector, etc.

The case was tried by a jury, who rendered a verdict for the plaintiffs, and judgment was rendered in accordance with said verdict. Defendants have appealed.

There are bills of exceptions in the record which, however, it is not necessary to notice in this opinion more particularly, as they practically present the questions presented by their answer, to wit: that the securities are not bound, because their principal was not legally collector, and because much of the moneys collected as licenses and fines, had not been legally assessed.

These questions can not be raised in this collateral manner. It is a fact that the principal on the bond did act as collector, at least, under color of authority; and that he did collect the licenses and fines imposed by those who were acting under color of authority; he must account for the moneys collected by him even though unduly collected, and the sureties bound themselves to do so, if he did not. Nor is there any merit in the defense that they are bound only for such moneys as the principal collected during the first month of the term of his office, as he was required by law to make monthly settlements. It is evident that a violation of duty by the principal, can be no excuse for the sureties, who are bound for the consequences of all violations of his duties.

It is therefore ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 526.

STATE OF LOUISIANA ex rel. JACOB A. MEYER v. JOSHUA VAN TROMP.

This is a contest for the office of recorder of the parish of West Feliciana. The vacancy having occurred when the Senate was not in session. the nomination to fill the same was properly made at the called session which was the "next session" after the vacancy occurred. To fill this vacancy the Governor had the power to nominate whom he pleased, and this without regard to any appointment he had made during the recess.

A PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J.* Jury trial. *W. W. Leake*, district attorney *ad hoc*, *S. J. Powell*, for relator and appellant. *Farrar & Montgomery*, for defendant and appellee.

MORGAN, J. When the Senate was in recess, a vacancy occurred in the office of recorder of the parish of West Feliciana. Van Tromp

was appointed to fill it. The Governor afterward convened the Legislature in extra session.

At this session he nominated J. C. Meyer for the office. The nomination was confirmed, and a commission was issued to him.

Van Tromp claims that the appointment of Meyer was illegal, and refuses to give him up the office.

The vacancy having occurred when the Senate was not in session, the nomination to fill the same was properly made at the called session, which was the "next session" after the vacancy occurred. To fill this vacancy the Governor had the power to nominate whom he pleased, and this without regard to any appointment he might have made during the recess.

The nomination by the Governor of the plaintiff, his confirmation by the Senate, and the possession of his commission, entitles him to the office which he claims.

The views thus expressed, renders it unnecessary to examine the bills of exceptions, which are in the record.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the plaintiff decreeing him to be entitled to the office of recorder of the parish of West Feliciana, and that he be put in possession thereof, in conformity with the prayer of his petition, and that the injunction prayed for by the plaintiff and as against the said defendant be made perpetual, defendant to pay the costs in both courts.

No. 582.

C. W. KEETING v. ARTHUR, STONE & Co.

The judgment of the lower court, predicated upon the ground that the proceedings in bankruptcy in relation to plaintiff in injunction are still pending, and that execution on the defendant's judgment can not legally issue until the final judgment of the bankrupt court decreeing a discharge of the bankrupt, or not, be rendered, is correct.

The defendants made themselves parties to the bankrupt proceedings, opposing the discharge of the plaintiff, and the matter remains undecided in the bankrupt court. He has the right to have the execution suspended until the final action of said court.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Duncan & Moncure*, for plaintiff and appellee. *Land & Taylor*, for defendants and appellants.

TALIAFERRO, J. The plaintiff enjoins the execution of a judgment rendered against the firm of McVean, Thompson & Keeting, of which he was a member. The grounds are stated to be:

First—That the debt on which the judgment was rendered was con-

tracted before his marriage and the property seized and about to be sold to satisfy the judgment is community property, and can not be subjected to the payment of his debts contracted anterior to his marriage.

Second—That on the thirteenth of May, 1868, the plaintiff made a surrender in bankruptcy and was adjudged a bankrupt by the proper court—that the proceedings in bankruptcy are still pending and undecided and operate a stay or suspension of all further legal proceedings against him and his property pending these in the bankrupt court.

The defendants moved to dissolve the injunction on the following grounds :

First—That the lots and property seized, although acquired after marriage, are liable to seizure and sale for the debts of the husband contracted anterior to the existence of the community.

Second—Because if plaintiff were adjudged a bankrupt before judgment was rendered against him in favor of Arthur, Stone & Co. plaintiff should have pleaded his bankruptcy as a bar before judgment was rendered against him ; and having failed so to plead, he can not by means of injunction set up a defense or exception which he could have pleaded before judgment.

Third—Because plaintiff's petition on its face discloses no cause of action.

On the trial of this motion the injunction was sustained on both the grounds upon which it was based, and the motion was overruled. The defendants then answered to the merits, and the case was tried on the same issues presented on the trial of the rule, and with the same result, except that the court, on the trial on the merits, did not pass upon the first ground of the injunction, and consequently only maintained the injunction until the final judgment and decree of the bankrupt court shall be rendered, reserving to both parties all their legal rights and remedies under the pleadings.

The defendants have appealed.

In this court the plaintiff prays an amendment of the judgment so as to render the injunction perpetual, and to allow him damages for an illegal seizure of his property as prayed for in his original petition.

We deem it unnecessary to pass upon the question raised by the first ground stated as cause for the injunction. The judgment of the lower court predicated upon the second ground, namely, that the proceedings in bankruptcy are still pending, and that execution on the defendants' judgment can not legally issue until the final judgment of the bankrupt court decreeing a discharge of the bankrupt or not be rendered, we think correct.

In the case of *Gallagher v. Michel*, 26 An. 41, it was held that, as

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plaintiff did not set up his discharge in bankruptcy as a defense before judgment, he could not afterward make it cause for injunction. It is argued that if a discharge in bankruptcy must be pleaded before judgment, so ought also a mere adjudication which operates merely a stay of proceedings. In the case of Gallagher a discharge was decreed before final judgment in the State court, and he might have pleaded that discharge.

In the case at bar no discharge has yet been decreed, and therefore the plaintiff could not plead a discharge before judgment. If he ultimately obtains a discharge, it will operate a release from the debt for which the defendants have obtained a judgment against the plaintiff, and upon which they have issued the execution enjoined by him. These defendants made themselves parties to the bankrupt proceedings, opposing the discharge of the plaintiff, and the matter remains undecided in the bankrupt court as to whether the plaintiff will be discharged or not. He has the right to have the execution suspended until the final action of the bankrupt court. *Mosby v. Steele*, 7 Ala. 229; *James on Bankruptcy*, pp. 98 and 99.

It is therefore ordered that the judgment of the district court be affirmed with costs.

No. 520.

THE STATE OF LOUISIANA v. ALCEE HARRIS AND TONEY NELLUM.

Alcee Harris and Toney Nellum were indicted for murder. No severance was asked by either of the defendants. On the trial evidence of confession by Nellum was offered against him, not objected to and received. The position taken by Alcee Harris that it involves her in the crime, that it was hearsay, and therefore not admissible, can not be maintained. The evidence was only offered against Nellum and admitted as to him. It was not, under the instructions of the judge, used against Alcee Harris. Hence she can not complain. It must be presumed that the jury followed the instructions of the judge. Both defendants moved for a new trial, which was refused. As no question of law is presented in either of these motions, this court can not consider the legality of the judge's rulings upon them.

The word *willful* is not sacramental, and its omission in the indictment does not vitiate that instrument. Defendants are charged with having feloniously murdered the deceased. The felonious murdering was necessarily a willful act. Whether it was willful and felonious were questions of fact which it was the province of the jury to decide.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J.* Criminal case. *C. T. Dunn*, district attorney, for plaintiff and appellee. *Robert J. Caldwell*, for defendants and appellants.

MORGAN, J. The accused were indicted and found guilty of the murder of Henry Harris. They were sentenced to be hung, and have appealed to us.

On the trial Alcee Harris objected to the introduction of the testimony of T. McEnery, a witness on the part of the State, who swore that Nellum had confessed to the murder of the deceased, his confession involving her in the crime. No severance was asked by either of the defendants. The testimony of McEnery was not objected to by Nellum. Alcee contends that, as to her, it was hearsay, and therefore inadmissible. This evidence was only offered and received as against Nellum, and as to him it was admissible. She also contends that the evidence was inadmissible because McEnery, to whom the confession was made, had no authority to arrest and detain Nellum, McEnery being a private citizen, clothed with no authority.

As this testimony was not used against her, under the instructions of the district judge, she can not complain. She urges that it had an effect upon the jury. But we must presume that the jury followed the instructions of the court, and that her conviction resulted from evidence other than McEnery's.

They both moved for a new trial, on the ground that the verdict of the jury was contrary to law and the evidence. The new trial was refused. As no question of law is presented in either of these motions, we can not consider the legality of the judge's rulings upon them. Both defendants then moved for an arrest of judgment. They aver that the indictment is fatally defective, inasmuch as it reads: "And him (Henry Harris) they, Alcee Harris and Toney Nellum, did feloniously, and of their malice aforethought, kill and murder then and there; when in fact and in law the indictment should contain, and the State should have alleged and inserted a count that the parties to the indictment did feloniously, willfully, and of their malice aforethought, kill and murder the deceased. In simple phrase, they contend that the word *willful* is not to be found in the indictment; that this word is sacramental, and that being omitted the indictment is worthless.

We can not assent to their proposition. They are charged with having feloniously murdered the deceased. The felonious murdering was necessarily a willful act. The word *willful* is not sacramental in an indictment for murder. If the killing had not been willful, it would not have been murder; if it had not been felonious, it would not have been murder. Whether it was willful and felonious, were questions of fact which it was the province of the jury to decide, without deciding which against them, they could not have been convicted.

The district judge has not erred in his rulings in this case, and the law must take its course.

Judgment affirmed.

Rehearing refused.

No. 522.

SUCCESSION OF EVERETT MILLER—Contestation in regard to administration and oppositions to the account filed by the Public Administrator.

The law establishing the office of public administrator did not repeal the clause of the article of the Civil Code, giving the wife, under certain contingencies, the right to administer the succession of her husband. The succession of Miller is not of that class of vacant successions which the law authorizes the public administrator to administer *virtute officii*.

The judgment of the court below is erroneous in allowing commissions to the public administrator. He was wholly without right to administer the estate, and he knew it. His pretension that he was appointed to administer provisionally, does not help his case. The provisional appointment was improperly made.

The provisional appointment of the public administrator to administer an estate applies only to cases of contestation between third parties, not to cases where the public administrator himself is a contestant, and especially where he puts up that contestation for his own profit.

Whatever charges have been incurred for inventory, appraisement and proceedings to put the opponent, Mrs. Miller, in possession, are to be at the cost of the succession, but not the costs incurred by her opposition to the public administrator's claim to administer the estate.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J. Robert J. Caldwell*, for public administrator, appellant. *S. D. McEnery*, for Mrs. Miller, opponent and appellant. *John H. Dinkgrave*, for absent heirs, appellants.

TALIAFERRO, J. This case presents a very unseemly controversy, brought on by the mistaken course pursued by the public administrator of the parish in assuming in that capacity the administration of the estate. Everett Miller died in Monroe on the ninth of October, 1874, leaving a wife, who was entitled to the administration of his succession, Civil Code, article —.

The law establishing the office of public administrator did not repeal the clause of that article giving the wife, under certain contingencies, the right to administer the succession of her husband. The succession of Miller is not of that class of vacant successions which the law authorizes the public administrator to administer *virtute officii*.

The facts seem to be that, only two or three days after the decease of Miller, an attorney, acting on behalf of the widow, was awaiting the arrival of the parish judge at his office in order to present her petition for the administration, when the public administrator, aware of this fact, anticipated her application by posting out to the residence of the judge, some four miles out of town, and procured an order for the administration.

Mrs. Miller filed an opposition, praying to be put in possession under article 930 R. C. This opposition was sustained by the parish judge, and an order rendered that the effects of the succession be put into

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her possession upon the filing by her of the required bond. The bond was furnished, but the putting into possession was not carried into effect.

The testimony of certain parties residing at a distance, was taken under commission, for the purpose of establishing that there were heirs of Miller entitled to the estate. These parties afterward appeared and opposed the delivery of the succession to Mrs. Miller, and prayed to be recognized as the heirs of Miller and placed in possession of the estate. A counsel of absent heirs was appointed.

On the same day that the opposition of Mrs. Miller was filed, the judge appointed the public administrator to administer provisionally until the rights of the respective claimants should be finally determined.

An order was obtained upon application of the widow, that the acting administrator file an account. Under this order he filed an account nearly every item of which was opposed by her. The effort made to establish heirship in any of the parties from abroad, proved a failure.

It came out that Miller, the deceased, was illegitimate. The relationship of the persons claiming his succession, one the uncle and the other an aunt, could not sustain their pretensions to the inheritance of his succession. The surviving wife was left without competitors for the heirship, and was properly decreed entitled to the property. The debts of the deceased, it seems were few and unimportant.

Judgment was rendered on the opposition to the account, and the application of Boyer and Caroline Nestley to be recognized as heirs of the deceased. The application of these parties was dismissed at their costs. The account was homologated in all its parts, except that the amount on which the percentage allowed as commissions was reduced to \$2457, instead of allowing it on the whole amount of the succession. The administrator was authorized to retain \$122 85 for his commissions; also \$100 to pay attorney's fees for the succession, and to retain the sum stated in the account to pay clerk's costs. The costs of Mrs. Miller's opposition and those accruing on the homologation of the final account, to be borne by the succession. The decree finally ordered, that in default of delivering to Mrs. Miller the property within ten days, a writ of possession issue.

From this judgment both parties appealed.

The judgment is erroneous in allowing commissions to the public administrator, and in allowing the sum of one hundred dollars for attorney's fees. The public administrator was wholly without right to administer the estate. He knew that the deceased had left a wife, and he was in hot haste to procure an order granting him the administration before her application for it could be presented, and which he

knew was already prepared and about to be presented. His pretension that he was appointed to administer provisionally, does not help his case. The provisional appointment was improperly made. The provisional appointment of the public administrator to administer an estate, applies only to cases of contestation between third parties—not to cases where the public administrator himself is a contestant, and especially where he gets up that contestation for his own profit. If this were otherwise, the public administrator could not be prevented from clutching every succession that opens within the range of his authority. By setting up his claim to administer and invoking opposition, he would get the provisional administration and claim his commissions, and thus he might levy a kind of tribute upon every succession that opened within the limits of the parish in which he exercises his functions.

The pertinacity with which the public administrator in this case has held possession of the succession after an order was rendered for the delivery of it to the opponent, and after she had furnished the required bond, is anything but commendable. His pretense being that he had the right to retain it until he was paid the commissions he charges, not one cent of which he is entitled to, has no force.

Whatever charges have been incurred for inventory, appraisement, and proceedings to put the opponent, Mrs. Miller, in possession, are to be at the cost of the succession; but not the costs incurred by her opposition to the public administrator's claim to administer the estate. The charge of three dollars for photographing the deceased to be rejected. By his own showing the public administrator has collected rents due the estate to the amount of \$77. And it appears that he has paid out of the funds of the succession for taxes due by the estate \$24 20. Insurance on buildings \$20, and \$5 for grave digging. These charges were properly allowed as charges against the succession. But we do not find the data sufficiently explicit to determine with certainty the amount of funds that came into his hands belonging to the succession, nor the amount he paid that inured to the benefit of the succession. We conclude, however, that the latter were covered by the former and that the estate owes him nothing.

It is therefore ordered that the judgment of the parish court, so far as it rejects the claims of Christian Boyer and Caroline Nestly to be recognized as the heirs of Everett Miller, deceased, and rejects the claim of \$75 fee for counsel for absent heirs, be affirmed, and in all other respects that it be annulled, avoided and reversed. It is further ordered that the costs incurred in procuring the appointment of the public administrator to administer the estate, and all costs incurred by and growing out of the contestation for the administration

be paid by the public administrator. There is reserved to him the right to claim from the succession or the heir in possession any sum which may be found owing to him, if any, for money advanced or paid by him, and which inured to the benefit of the succession; the right being reciprocally reserved to Mrs. Miller, or the succession, to require him to account for all funds belonging to the succession received by him. It is lastly ordered that a writ of possession issue, and the sheriff is ordered to proceed forthwith under the same to put into the possession of Charlotte Temple Miller, surviving wife and heir of Everett Miller, deceased, all the property of every kind belonging to his succession.

No. 556.

STATE ex rel. OSCAR J. FORSTALL v. THE BOARD OF LIQUIDATION.

The relator is the holder, for various persons, of bonds known as the Levee Bonds, and of other bonds issued for "paying certain debts" under the act of fifteenth of February, 1866. He prays for a mandamus compelling the board of liquidators to fund his bonds. Critically considered, he rests his rights so to do upon the sole ground that the act of the Legislature, No. 11, of the session of 1875, is unconstitutional. The issue is made up by the answer of the board, as well as of the State, which denies the validity and legality of the bonds. That issue is, whether the act No. 11, acts of 1875, conflicts with the amendment to the constitution adopted in 1874, and the act No. 3, of the acts of 1874, which this amendment was intended to make irrepealable and unalterable by a subsequent Legislature.

All holders of bonds issued by the board under the act of 1874 are protected in their rights.

The Legislature can pass no law affecting their validity; for this would be impairing a contract already consummated.

But the relator has made no contract with the State under this act. His bonds are not bonds issued under this statute. He asks that bonds be given him in exchange for those he holds.

There is nothing unconstitutional in an act of the Legislature which gives to the citizens of the State the right to see that no claim set up against it shall be passed until the validity thereof is ascertained. There is no violation of any contract with the relator by the act in question, because, at the time the act was passed, no contract existed under the act of 1874 between him and the State. The bonds he holds now are in the same condition that they were prior to the passage of either of the acts now under consideration.

The act No. 11 of the acts passed at the extra session of the Legislature of 1875 and approved on the seventeenth May of the same year does not conflict with the amendment to the constitution adopted in 1874, and is therefore constitutional.

The levee bonds in the possession of the relator are valid obligations against the State, and should be funded.

In so far as relates to the bonds alleged to have been issued under the statute approved February 15, 1866, the application of the relator to have them funded must be dismissed on account of a discrepancy in the proof of their issuance which can not be supplied.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, *J. Q. A. Fellows, J. B. Cotton*, for defendants and appellants. *C. T. Bemiss*, for relator and appellee.

MORGAN, J. Section 1 of act No. 3, session acts of 1874, page 39, provides: "That for the purpose of consolidating and reducing the

floating and bonded debt of the State, the Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State and Speaker of the House of Representatives are hereby authorized to cause to be prepared, and to issue bonds, to be known as consolidated bonds of the State of Louisiana, of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively, and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York and city of New Orleans on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States."

Section 3 provides: "That the bonds authorized by section one shall be signed by the Governor, Auditor and Secretary of State, and the coupons shall be signed by the Auditor and Treasurer; and when so prepared said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the State and all valid warrants drawn previous to the passage of this act by the respective Auditors of Public Accounts of the State on the Treasurer thereof, except warrants issued by the Auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants; provided, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act."

The same Legislature, at the same session, proposed an amendment to the constitution of the State. The first number of this amendment is as follows:

"The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be

paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury."

This amendment was adopted, and it now forms part of the organic law of the State.

The Legislature, at an extra session held in 1875, act No. 11, p. 110, enacted :

"That the Board of Liquidation constituted by the second section of act No. 3, approved January 24, 1874, entitled an act to provide for funding obligations of the State by exchange for bonds, etc., is hereby prohibited from issuing any bonds in exchange for any outstanding bonds of the State or warrants drawn previous to the passage of said act by the respective Auditors of Public Accounts of the State on the treasury thereof, forming items of State indebtedness, the legality or validity of which may have been, or may hereafter be, questioned, until said bonds or warrants shall first, by final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration; that any person assessed for State taxes is hereby authorized in his own name to institute suit or to intervene in any suit which may now or hereafter be instituted in a court of competent jurisdiction in the parish of Orleans against said Board of Liquidation, to test the legality and validity of any issue of bonds of the State, or warrants drawn previous to the passage of said act No. 3 by the Auditor of Public Accounts on the State treasury, the legality and validity of which may have been or may hereafter be questioned, and to inquire into the consideration for which said bonds or warrants may have been issued, and in his own name to prosecute such suit or suits to a final termination; and until the legality and validity of each and every issue of bonds and warrants as aforesaid shall have been finally passed upon and determined by the Supreme Court of the State of Louisiana; and that in order to facilitate and bring to a speedy determination all matters in controversy, as provided for in this act, every suit hereby instituted shall have precedence in all courts over all other cases, and to be fixed by motion of either party; the day of trial to be named in the motion fixing such cases for trial to give way thereto; that all costs incurred in any suits under this act, to the extent of one suit carried to a final issue, as to each separate issue of bonds or warrants, the legality, validity or consideration of which are questioned, if the court

shall so determine, shall be borne by the State of Louisiana, and which costs, on approval of the court, shall be warranted for by the Auditor of Public Accounts on the State Treasurer, to be paid out of any funds in the treasury not otherwise appropriated; provided, that any holder or holders of bonds or warrants whose legality, validity or consideration is questioned in any suit or suits brought under the provisions of this act, may intervene in said suit or suits, and that the costs of such interventions shall abide the results of the suits in which such interventions shall be filed."

Section two provides, "That the following issue of bonds and warrants, so far as the same may be now outstanding, are declared questioned and doubtful as to their legality and validity, and said board of liquidation are hereby prohibited from issuing bonds authorized by section one of act No. 3 of 1874, in exchange therefor until the legality, validity and consideration of the same shall have been tested under the provisions of this act, and a final decree rendered as to their legality, validity and consideration, to wit:

Here follows a list of the bonds whose validity is questioned, among which are to be found:

"Bonds under act No. 115, approved March, 1867, for expenses of building levees, \$4,000,000; bonds under act No. 32, approved February 25, 1870, for work done or to be done on the levees, \$2,960,000."

The relator asserts that he is the holder, for various parties, of 149 bonds, known as the levee bonds, for \$1000 each, and 38 bonds of \$1000 each, issued for "paying certain debts" under the act of fifteenth February, 1866. He avers that it is made the duty of the Board of Liquidation to cause to be prepared and to issue bonds to be known as the consolidated bonds of the State of Louisiana, which bonds, when so made by the board and signed, shall be exchanged by the board for all valid outstanding bonds of the State, and all valid warrants. He proves, without objection, although he does not allege it, that he presented his bonds to the Board of Liquidators, who declined to exchange them for bonds as provided in the act of twenty-sixth January, 1874, upon the ground that they were prohibited from doing so under the act of seventeenth May, 1875. He prays for a mandamus compelling the Board of Liquidators to fund his bonds. He avers that the act entitled "an act supplemental to the act approved January 26, 1874, is in conflict with act No. 3 of 1874, to which it is a supplement, and is "an attempt on the part of the Legislature to control the action of the Funding Board, and thereby deprives the holders of the bonds and other evidences of debt of their rights as defined under act No. 3 of 1874, and is, to that extent, a violation of the compact entered into

between the people of the State and the bondholders, and is, to that extent, unconstitutional, null and void."

Critically considered, he rests his right to force the Board of Liquidation to fund his bonds upon the sole ground that the act of the Legislature, No. 11, of the session of 1875, is unconstitutional.

No objection is made to the form of this proceeding or to the insufficiency of the allegations in the petition. The issue is made up by the answer of the board as well as the State, which denies the validity and legality of the bonds. By the answer, the issue presented is—

First—Whether the act No. 11, acts of 1875, conflicts with the amendment to the constitution adopted in 1874, which we have already quoted, and the act No. 3 of the acts of 1874, which this amendment was intended to make irrevocable and unalterable by a subsequent Legislature.

The act of 1874, authorized the funding of the valid debt of the State, and authorized the Board of Liquidation to issue bonds therefor. The validity of the obligations presented to the board was to be judged of, in the first instance, by the board, with the right of appeal to the courts by any claimant whose bonds the board refused to fund. The amendment to the constitution provided that all bonds issued by the board should be a valid obligation of the State in favor of the holder thereof, and prohibits any court from enjoining the payment of such bonds or the interest due thereon. All holders of bonds, therefore, issued by the board under this act, are protected in their rights. The Legislature can pass no law affecting their validity, for this would be impairing a contract already consummated. But we do not understand that this prohibition extends beyond the bonds issued in conformity with the statute under consideration. The relator has made no contract with the State under this act. His bonds are not bonds issued under this statute. He simply claims the benefit of its provisions. He asks that bonds be given him in exchange for those which he now holds. By the first act the board was given the power to pass, primarily, upon the validity of his bonds. They certainly would not have been funded if the board considered them invalid. If the decision had been against him he would have appealed to the courts, if he had felt himself wronged. If the courts had come to the conclusion that his debt was a valid one, the board would have been compelled to issue the bonds as provided for by the act. In the last resort, therefore, the decision of his rights depended upon the courts. It was only those obligations which the board considered unquestionable which it was authorized to issue bonds for.

Now the Legislature has seen proper to take away the absolute determination of the validity of the claims which were likely to be

presented under this act from the Board of Liquidation, and give to any taxpayer the right to have the question of their validity passed upon by the courts.

It has also seen proper to designate certain outstanding bonds and other evidences of debt as suspicious, and to prohibit the board from funding them until their validity shall have been passed upon by the courts. There is nothing that we can see which is unconstitutional in an act of the Legislature which gives to the citizens of the State the right to see that no claim set up against it shall be paid until the validity thereof is ascertained.

There is no violation of any contract with the relator by the act in question, because at the time the act was passed no contract existed, under the act of 1874, between him and the State. The bonds he holds now are in the same condition that they were prior to the passage of either of the acts now under consideration.

We therefore decide that the act No. 11 of the acts passed at the extra session of the Legislature of 1875, and approved May 17, 1875, does not conflict with the amendment to the constitution adopted in 1874, and is therefore constitutional.

Second.—The next question is whether the bonds presented by the relators are valid obligations against the State.

The only bonds before us are certain bonds issued under act No. 32, approved February 25, 1870, for work done or to be done on the levees, and under act No. 115, approved March 26, 1867, for expenses of building levees. Also some bonds alleged to have issued under act of fifteenth February, 1866, "for the purpose of paying certain debts." And we desire to be distinctly understood that we are expressing no opinion upon the validity of any bonds except those before us and in the hands of the relator.

In so far as the levee bonds are concerned, the evidence satisfies us that those in the possession of the relator are valid obligations against the State, and that they should be funded.

As regards the bonds issued, as alleged, under act of fifteenth of February, 1866, we have only to say that there is no act of the Legislature of that date which authorizes the issue of any bonds. There is an act of the twelfth February, 1866, which authorizes an issue. Probably these are the bonds now sought to be funded, but the allegations in the petition are that they were issued under a certain act, and the bonds bear date of the act under which they are alleged to have been issued. There is a discrepancy here in the proof which we can not supply.

It is therefore ordered, adjudged and decreed that in so far as relates to the bonds alleged to have been issued under the statute, approved

fifteenth February, 1866, that the judgment of the district court be avoided, annulled and reversed, and the application of the relators be dismissed as in case of nonsuit.

And it is further ordered, adjudged and decreed, that as regards the bonds in the possession of the relator, issued under act No. 115, approved March 26, 1867, for expenses of building levees, and under act No. 32, approved February 25, 1870, for work done or to be done on the levees, and described in his petition, and in his possession, that the judgment of the district court be affirmed.

LUDELING, C. J., *dissenting*. The relator alleges that he is the holder of a number of the bonds of the State of Louisiana, which were acquired before maturity, for value and in due course of trade; that accepting the terms of the act of January 24, 1874, he presented said bonds to the Board of Liquidation, created by said act, to be exchanged according to the terms of said act and the constitutional amendments, but that said board refused to act in the matter, on the ground that act No. 11 of the General Assembly of 1875, prohibited them from funding said bonds until after the Supreme Court of the State shall have decided that they were valid obligations of the State. The relator alleges that act No. 11 is unconstitutional and null, and he asks for a mandamus to compel said Board of Liquidation to act on their application without reference to said act No. 11 of 1875, exercising the discretion vested in them by act No. 3 of January 24, 1874.

The only question presented for decision is the constitutionality of the act No. 11 of 1875, *vel non*?

If the act No. 3 of 1874 stood alone, it could not be seriously doubted that until its terms were accepted by the holders of the obligations of the State, the proposition therein made might be withdrawn by the State. But the fact is, act No. 3 of 1874 and the constitutional amendments form parts of one proposition, which was submitted to the holders of obligations of the State, without any limitation as to the time in which it could be accepted by them. This is apparent from a history of act No. 3 and the constitutional amendments. Act No. 3 was approved on the twenty-fourth of January, 1874. Act No. 4 of the same Legislature, proposed the constitutional amendments and ordered their submission to the voters for ratification. It also was approved by the Governor on the twenty-fourth of January, 1874. The objects of act No. 3 are clearly indicated by its title; it is "an act to provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations therefor; to levy a continu-

ing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State, and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws."

The amendments to the constitution are as follows: "The issue of consolidated bonds, authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal and interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year, until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury.

No. 2. "Whenever the debt of the State shall have been reduced below twenty-five million dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt be reduced to fifteen million dollars, beyond which it shall not be increased. Nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion."

Thus it appears that on the same day the General Assembly passed act No. 3 and act No. 4, that on the twenty-fourth of January the Governor approved both bills. The act No. 3 levies an annual and continuing tax to pay the interest and principal of the consolidated bonds; and the amendment declares that "the tax required for the payment of the principal and interest of said bonds shall be paid," etc., "and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury." This clearly refers to the legislation contained in act No. 3, for no assessment or appropriation is made in the amendment.

Again, section 6 of the act No. 3 requires the board to publish a notice of the adoption of this act, in one or more journals of New Orleans, New York, London, Paris and Amsterdam. In November, 1874, at a general election in the State, the constitutional amendments were adopted, with a full knowledge of the legislation contained in act No. 3 and said amendments. These amendments were intended to guarantee the performance of the obligations of the State, stipulated in act No. 3.

The adoption of the amendments was tantamount to saying that there was no limitation of time within which the creditors of the State should accept her proposition. The State, alleging her inability to pay the whole of her indebtedness, but protesting her willingness to pay her just debts to the full extent of her ability, offered a compromise to said creditors; and, as a guarantee against repudiation, made such amendments to her constitution, with the approval of the people, as was deemed sufficient to insure the prompt and punctual payment of the novated debts in defiance of the will or caprice of any and all future legislatures.

The plain intentment and spirit of the constitutional amendments are the enforcement of the obligations stipulated in the act No. 3. Section 11 of said act declares, "that each provision of this act shall be, and is hereby declared to be, a contract between the State of Louisiana and each and every holder of the bonds issued under this act."

Millions of the obligations of the State had been novated under this law, before the passage of act No. 11. This last act changed several provisions of act No. 3. For this, if for no other reason, the act is unconstitutional. If one part of the act can be altered, any other provision thereof may be changed, and the outstanding obligations might be novated on terms more favorable to the creditors than those proposed in act No. 3, which would be a breach of good faith to those who had funded their debts, on the supposition that all the outstanding obligations of the State were to be funded on the same terms. Or section 7 of act No. 3 might be repealed, which is the only law levying a tax and making an appropriation for the payment of the interest and principal of the consolidated bonds, when due, and thus practically defeat the object of the constitutional amendments, to wit, the prevention of repudiation.

I conclude that act No. 3 is irrepealable, and that act No. 11, approved May, 1875, is unconstitutional, and that the mandamus should be made peremptory. I therefore dissent from the opinion of the court in this case.

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No. 560.

SUCCESSION OF DAVID HASLEY—Opposition of Heirs to Provisional and Final Account.

In this instance, if the accountant saw fit to file an amendment to her original account, it was but just that the opponents should have the right to oppose it, and for that purpose some delay was absolutely necessary. The judge *a quo* did not err in overruling the objection to the granting of the delay; nor was the objection to the permission to amend, if it be so regarded, better founded. No injury could result to any one, and it was the interest of all parties that an end be put to this litigation.

The fee allowed in the account, which was the object of the controversy, for defending the suit to reduce the legacy to the disposable portion, is not a proper charge against the estate. The testator having left *forced heirs*, the executrix might have learned from any member of the bar that the bequest of the usufruct of the *whole* of his property was reducible, and there was no necessity for defending such a suit, at least by the *executrix*. If the *legatee* chose to defend, it was to be at his own costs.

The opposition to the credit claimed for commissions due to the executrix should be maintained, as she is a legatee under the will.

Newman having died without forced heirs, giving by his will to his widow, the present Mrs. Hasley, the usufruct of his estate during her life, and the property itself to some of his heirs, and Hasley, after his marriage with widow Newman, having bought the rights and interests of all the heirs and legatees, these rights entered into the community then existing between Hasley and his wife, and at his death, one-half thereof belonged in full ownership to her, and the other half belonged to his heirs, subject to her usufruct, created by the will of Newman, her first husband. The *naked property* of this half interest in and to the property of Newman belongs to the heirs of Hasley, and she should be charged with its inventoried value.

As the community owned only the *naked property* to one-half of the estate, consequently the community owed Mrs. Newman, in addition to the price of her half of the property, the value, whatever that may be, of the usufruct of the property sold. No confusion ever took place as to the usufruct of Mrs. Newman, as *she* never purchased the naked property. The *community* and *she* were distinct and separate persons.

In the absence of other proof as to the value of the usufruct of such property, this court will consider the interest allowed by law for moneys due, as the value of such usufruct, and this the accountant is entitled to in addition to the half of the price of said sales.

Charges for the value of timber standing on the separate lands of the wife at the time of her marriage, and after that cut and sold, were properly allowed. The timber, before being cut, belonged to the wife, and its value received by the husband is a proper charge against the community.

The judgment of the court *a qua* giving the executrix five per cent. per annum interest on all the items allowed to her for paraphernal property disposed of by the husband, is wrong. Interest should be allowed only from the dissolution of the community, as the interests before that period entered into the community.

There being no debts due by the estate, that portion of the judgment of the court *a qua* which prolongs the administration of the executrix, to collect the notes and judgments due to the estate, is wrong. The administration should be closed, and the property should be turned over to those entitled to it as soon as possible.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J. R. W. & R. Richardson*, for executrix. *Cobb & Gunby*, for opponents and appellants.

LUDELING, C. J. David Hasley died in January, 1873. He left a widow, a son and two grand children by a former marriage. His estate exceeded \$60,000, and it was nearly all acquired during his marriage with the second wife. He left a will, by which he gave the usufruct of all his property to his widow, during her life, and he appoint-

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ed her his executrix. The will was probated, and Mrs. Hasley was confirmed testamentary executrix.

The heirs of Hasley then sued to have the will annulled, and by a judgment of this court the will was held to be valid. The heirs then sued to reduce the legacy to the disposable portion, and for the rendition of an account, and for a partition. There was judgment reducing the disposition in the will, and ordering an account. A provisional account was filed, which was opposed by the heirs. The opposition was maintained in part, and as amended, the account was homologated; a final account and a partition were ordered. Appeals were taken from both of said judgments, but no transcript of appeal has been filed in this court in either case, although the return day has long since passed.

The executrix then filed what she called her final account. In this account the executrix stated that she had claims against the estate of David Hasley for her paraphernal property, received and disposed of by Hasley during their marriage, which she proposed to present at a future time. The heirs filed oppositions to this account, and specially denied that she had any claims against Hasley's succession for paraphernal rights.

The case was then fixed for trial for the eleventh of May. On the tenth of May, the executrix filed what she termed an amended account, in which she set forth her claim for paraphernal property disposed of by her deceased husband, which had been alluded to in her original account. The trial of the oppositions commenced on the eleventh May, and on the thirteenth of May the heirs filed an opposition to Mrs. Hasley's claim filed on the tenth of May. Objections were made to the filing of this opposition, on the grounds that it came too late, as the trial had been progressing two days, and because the conventional demand for the value of the ameliorations put upon her paraphernal property is not stated with sufficient particularity and certainty. The objections were overruled and a bill of exceptions was taken.

We think the judge *a quo* ruled correctly. If the accountant saw fit to file an amendment to her original account, it was but just that the opponents should have the right to oppose it, and for that purpose some delay was absolutely necessary, and within three days they filed their objections to it. The other objection is equally untenable. It was to the interest of all parties that an end be put to this litigation, and no injury could result to any one by permitting the amended opposition, if it be so regarded.

On the trial of the opposition the executrix pleaded *res judicata* to all items opposed, which figured on the provisional account. We

think the plea should be maintained. As already stated, the appeal taken from the judgment homologating the account was never filed in this court, and that judgment is now conclusive. We have, therefore, confined our examination to the objections urged to the judgment appealed from, which relate to matters not embraced in the provisional account; nor will we notice the criticisms of counsel, either on the form or want of completeness of the accounts.

The objections that the executrix has been guilty of dereliction of duty in not filing her final account, and in not collecting the assets of the estate, are not well founded. It appears from this record that almost from the opening of the succession, the executrix has been involved in litigations, which the heirs have instituted, and which necessarily delayed the close of her administration. As to the objection to her claim for credits for the notes returned, because she has *novated* them, it may be observed that she is the owner of one undivided half of all the assets of the succession, as partner in community, and she had, under the will, the usufruct of the other half during her life. The changes that were made in the notes were manifestly for the interest of all interested in the succession, as, for instance, the interest on the notes were capitalized and new notes taken, with additional security, and others were made more secure by requiring a part thereof to be paid for an extension of time, and under circumstances which would have induced a prudent person to act in the same manner. From the evidence it appears that no injury to the heirs has resulted or is likely to result from the acts of the executrix aforesaid; therefore they have no just cause to complain of said acts.

The objection to the sales of lands in section 43 to Hester, the Hasley Baptist Church, and Lemle, is inconsiderate, for the amount for which she accounts largely exceeds the inventoried value of said lands; nor can the sales be decreed to be null in this suit, as the vendees are not before us. The credit for account of T. C. Siendifer & Co. is embraced in the provisional account homologated and will not be further noticed.

The objection to item of \$239 10 for marble slab over and iron railing around the grave of their ancestor, comes with a bad grace from the heirs, who are enriched by his estate, even though the railing surrounds the grave of executrix's first husband, whose property also enabled their ancestor to make the gains which they inherit. The deceased was entitled to decent burial; and the amount expended for funeral expenses, including the above, was very moderate, considering the condition of the estate.

The next opposition is to the fees of attorneys. The amounts allowed by the judge *a quo* seem to be conceded to be correct, except

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the following: \$750, for defending the suit of J. J. Hasley et al v. P. B. Hasley, executrix; \$500, for defending suit to reduce the legacy and to account; \$1446 94, commissions on \$14,469 47, and \$500 for this account.

The fee of \$750 for defending the suit in which the validity of the will was attacked, is properly chargeable to the estate, and the amount is reasonable.

The fee for defending the suit to reduce the legacy to the disposable portion and for an account, is not a proper charge against the estate. The testator having left forced heirs, the executrix might have learned from any member of the bar that the bequest of the usufruct of the whole of his property was reducible, and there was no necessity for defending such a suit, at least, by the executrix. If the legatee chose to defend it, she should pay a reasonable fee. This item was, therefore, improperly allowed as a credit.

The item of \$1446 94 was opposed on the ground that no "professional services" were rendered in said collections, and that none were necessary, and that the charge is excessive for the services, if rendered. There is no proof in the record that such services were rendered, and the credit must be rejected.

The last item of \$500, for this account, we think should be allowed. The executrix was bound to render a final account, and for the services of an attorney for that purpose, a reasonable fee should be allowed. As already said, we do not consider that the executrix has been guilty of dereliction of duty, and the strenuous, and in many instances, unjust oppositions to the account, have increased the labors and consequently the fees of the attorney. The opposition to the credit claimed for commission due to the executrix should be maintained, and the credit allowed for \$1378 59 should be rejected, as she is a legatee under the will. C. C. 1686. The credit claimed by the executrix for the interest of the Newman heirs, brought by Hasley, inventoried at \$5225, is opposed. We think this opposition should be sustained.

L. Newman died in 1851, without forced heirs. By his will he gave his widow, the present Mrs. Hasley, the usufruct of his estate during her life, and to his brothers, sisters, and the children of deceased brothers and sisters, he gave his property, except some special legacies. After the marriage of David Hasley with the widow of L. Newman, Hasley bought the right or interest of all the heirs and legatees aforesaid, for the aggregate sum of \$5225. These rights entered into the community then existing between D. Hasley and his wife, and at his death one-half thereof belonged to her in full ownership, and the other half belonged to his heirs, subject to her usufruct, created by

the will of Newman. The *naked property* of this half interest in and to the property of L. Newman belongs to the heirs of Hasley, and she should be charged with its inventoried value, that is, \$2612 50.

In relation to the sales made of property belonging to the Newman estate, the opponents contend that inasmuch as Mrs. Hasley owned the one undivided half of the property, and the *community* owned the other half, that therefore, the *community* is chargeable only with the half of the price received for the property sold. That would be true, if the *community* did own the undivided half of the property in *full ownership*. But we have seen that the *community* owned only the *naked property* to one-half of the estate. Consequently the *community* owed her, in addition to the price of her half of the property, *the value*, whatever that may be, of *the usufruct* of the property sold. No confusion ever took place as to the usufruct of Mrs. Newman, as *she* never purchased the naked property; the *community* and she were distinct and separate persons. In the absence of other proof of the value of the usufruct of such property, we will consider the interest allowed by law for moneys due as the value of such usufruct; and this the accountant is entitled to in addition to the half of the price of said sales, which belonged to her. And she is further entitled to keep the \$2612 50 in order to enjoy her usufruct thereon till her death, on giving security according to law. The items of \$400 and \$50, received from J. R. Williams, \$400 from Jack Bass, \$1000 from E. Gross, etc., allowed by the judge *a quo*, were properly allowed under the evidence. The items for sales of logs to Bry & Essicks, and of cord wood sold to steamboats, etc., were also properly allowed. These charges are for the value of the timber standing on the separate lands of the wife at the time of her marriage, and afterwards cut and sold. The timber before being cut, belonged to the wife, and its value received by the husband, is a proper charge against the *community*; the logs and cord wood belonged to the *community*. We think the evidence authorized the allowance of the item of \$4600, for money received by Hasley and loaned at interest, as a part of the estate of L. Newman.

The judgment of the court *a qua* gave the executrix five per cent. per annum interest on all the items allowed to her for paraphernal property disposed of by the husband. This is wrong. Interest should be allowed only from the dissolution of the *community*, as the interests before that period entered into the *community*. By law now, all debts bear five per cent. interest from their maturity, unless otherwise stipulated. These remarks apply to the separate property of the wife, except to the price of her usufruct on property of the Newman estate, sold as aforesaid. The interest on the price of the property subject to the usufruct, was her separate property, and did not form

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part of the community, because it was not acquired during the community, the paid interest being the value or price of said usufruct; and the community owes said amounts received by him annually.

Having disposed of the objections made by the heirs to the judgment of the parish court on the claims of the widow, we will now proceed to dispose of the claims of the heirs for the ameliorations put upon the separate property of the wife. The court *a qua* allowed \$3963 50 as the value of the improvements placed on the separate estate of the wife, and directed that one-half that sum, less her interest as usufructuary of one-fifth, to wit: \$1585 be deducted from the sum allowed her for paraphernal property disposed of by the husband. The appellee has asked to have the judgment amended by rejecting the demand of the heirs, and by allowing the accountant the item of \$271 14, collected from Z. Johnson. This item appears to have been omitted in the opinion specifying the items of the accounts allowed, but the sum seems to have been added in the aggregate amount for which judgment was rendered. An examination of the testimony of the witnesses, satisfies us that the sum allowed by the judge *a quo* for the enhanced value of the property of the wife by the improvements placed thereon is too large.

J. P. Crosley says, "I don't know but what I would rather have the land as Hasley took it than in the condition it was at the time of his death." D. T. Head and Stamper, testify to the same effect.

There was a mill and gin placed on the lands, which are valued at from \$1000 to \$1500.

Crosley further testified as follows: "I would consider the Newman place, if at the death of Mr. Hasley, in 1873, it was in the same condition it was at the time of marriage in 1853, to have been worth about \$5000. My opinion is that the Newman place, at the death of Mr. Hasley, in 1853, with all improvements thereon, inclusive of the mill property, was worth about \$6000 or \$6500."

It is true, a witness for the opponents says: "I think, with the improvements put on it, the land was worth twice as much in 1873 as in 1853." But he does not state whether any of this increased value was the result of time or not; and he adds: "I would not know how to guess at the value of the land in 1873, as I am not much of a judge of the value of the lands; never owned much." And again he testified that "If the land was in the same condition in 1873 that it was in 1853, I don't think I would make much difference in the valuation of it." In another place he says: "It is guess work with me."

We fix the value of the improvements at \$1500. This amount therefore is due by the widow to the community.

That portion of the judgment of the court *a qua* which prolongs the

administration of the executrix to collect the notes and judgments due to the estate is wrong. There are no debts due by the estate; the administration should be closed and the property should be turned over to those entitled to it as soon as possible.

It is therefore ordered and adjudged that the judgment of the parish court be amended and corrected in the particulars stated in the foregoing opinion, and that as thus amended it be affirmed. It is further ordered that this case be remanded to the lower court to the end that a final partition of the property of the estate of David Hasley, as fixed by the views and principles announced in the foregoing opinion, be made between the heirs and the surviving widow of David Hasley according to law. It is further ordered that the succession pay costs of this appeal.

No. 583.

JOHN PHELPS & Co. v. HORACE BOUGHTON.

A garnishee can not waive service of the proceedings required by law to make a seizure of effects or property in his hands. In this case, as the garnishee was not legally served, nothing was attached in his hands.

The judge *a quo* erred in allowing damages on the dissolution of the attachment in this instance. It is not pretended that the plaintiffs were not entitled to sue out the attachment against their debtor, a non-resident. There has been no abuse of that harsh remedy here, but merely a failure to get the benefit of the writ, because of the error committed in executing the process.

APPPEAL from the Tenth Judicial District Court, parish of Caddo, *Looney, J. Land & Taylor*, for plaintiffs and appellants. *Duncan & Moncure*, for defendant and appellee.

WYLY, J. Plaintiffs, claiming to be creditors of the defendant, a non-resident, for \$1224 90, brought this suit against him for said amount, and they sued out an attachment by garnishment process with a view to seize the judgment of the defendant *v. Ross Wilkinson* for \$942 61, rendered in the district court, parish of Caddo, on twenty-fourth November, 1874.

A curator *ad hoc* was appointed for the defendant and the attachment notices duly posted. The interrogatories and citation were not served on the garnishees Wheaton, the clerk of the court, and Wilkinson, the debtor, in the judgment sought to be attached. The garnishees waived service of petition and citation and answered the interrogatories favorable to plaintiffs.

The court dissolved the attachment with fifty dollars damages, and plaintiffs appeal.

In *Schindler v. Smith*, 18 An. 476, this court held that a garnishee can not waive service of the proceedings required by law to make a

seizure of effects or property in his hands; that he is a mere stakeholder without pecuniary interest, not even liable for the cost; and as the garnishee was not legally served nothing was attached in his hands. We adhere to that opinion, and conclude that the judge did not err in setting aside the attachment. C. P. 246. He did err, however, in allowing damages.

It is not pretended that the plaintiffs were not entitled to sue out the attachment against their debtor, a non-resident; but the objection is that no valid seizure was made of his property, the judgment he holds against Wilkinson, the garnishee. If plaintiffs lose their attachment because they failed to seize thereunder defendant's property, we fail to perceive the loss defendant has sustained by reason of this non-seizure. If the attachment were dissolved because the plaintiffs were not entitled to it, it would be right to inflict damages for the abuse of a harsh remedy. Here, however, has been no abuse, but merely a failure to get the benefit of an attachment because of the error committed in executing the process. As the failure to make a seizure under the attachment will not preclude plaintiffs from subsequently obtaining the benefit of that conservatory remedy, we see no reason to disturb that part of the decree, reserving this right to plaintiffs.

It is therefore ordered that the judgment herein be amended by striking out that part allowing defendant damages, and as amended it is affirmed, appellee paying costs of appeal. C. P. 246.

No. 598.

SUCCESSION OF CALLIE N. NEWMAN. Opposition of G. W. NEWMAN.

The plea to the jurisdiction is without weight. The demand of the opponent under article 2382 of the Revised Code for a marital portion is not the action of a creditor against a succession. It is the portion which the law allows in the settlement of a succession to the surviving spouse in necessitous circumstances where the deceased died rich. It is a right which must be asserted in the court charged with the settlement of the succession.

APPPEAL from the Parish Court, parish of Bossier. *Fort, J. J. D. Watkins and T. M. Fort*, for opponent and appellee. *J. A. Snider, Nutt & Leonard*, for administrator and appellant.

WYLY, J. In the settlement of this succession the present controversy arises from the demand of G. W. Newman for the marital fourth of the succession of his deceased wife, Callie N. Newman, who died without leaving ascendants or descendants and leaving a succession of more than twenty-four thousand dollars after payment of debts. The amount stated is now in the hands of the administrator, and

Succession of Callie N. Newman.

the debts are paid. Besides this, there are a few outstanding claims belonging to the succession. The court allowed the opponent, G. W. Newman, one-fourth of the funds on hand, and J. L. C. Graham a collateral heir of the deceased, and her administrator, has appealed.

The objection of prematurity of the action is unfounded. The succession has been under administration for nine years, and is sufficiently liquidated for a settlement among the heirs. The plea to the jurisdiction is also without weight. The demand of the opponent G. W. Newman, under article 2362 of the Revised Code for a marital portion, is not the action of a creditor against a succession. It is the portion which the law allows in the settlement of a succession to the surviving spouse in necessitous circumstances where the deceased died rich. It is a right which must be asserted in the court charged with the settlement of the succession. All successions shall be opened and settled in the parish courts. Constitution, article 87.

It is shown that the husband has three horses and a buggy. The succession of his wife exceeds twenty-four thousand dollars in the hands of the administrator. He is entitled to the marital fourth. Succession of Fortier, 3 An. 104.

The court did not err in allowing the opponent G. W. Newman one-fourth of the funds of the succession in the hands of the administrator. Judgment affirmed.

No. 529.

NELSON J. SCOTT, Husband *v.* GEORGIA SCOTT, Wife.

No grave and insuperable cause exists justifying a decree of divorce in this case. It was not the intention of the lawmaker that courts should be governed in their decisions of cases of this sort by the declarations and wishes of the parties themselves, acting under excitement and dissatisfaction. Their allegations of grievances insupportable, must be made good by proof, to authorize the action of the judge. It is not every family feud declared by husband or wife to be insupportable, that will authorize a decree. It is in the great interests of society that the conjugal relation should not be dissolved except upon weighty and well established reasons.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. J. S. Young*, for plaintiff and appellant. *L. B. Watkins*, for defendant and appellee.

TALIAFERRO, J. The plaintiff prays to be divorced from his wife on the ground, as he alleges, that further co-habitation with her is insupportable; that her conduct is repugnant to the marriage covenant; that her conduct toward him and his children by a former marriage renders it insupportable to live with her, and that towards himself personally, her conduct is outrageous.

Scott, Husband v. Scott, Wife.

The wife, in answer to this petition, after denying all its allegations, sets up the charge against her husband of habitual intoxication on his part that renders it insupportable on her part to live with him; that he treats her in an exceedingly ill and crabbed manner, cursing and abusing her, and on one occasion that he slapped, beat and choked her. She reconvenes, praying a decree of divorce from her husband, a division of the community property between them, for alimony, etc.

There is a child of about three years old, issue of the marriage of these parties. Each claims to have the custody of the child decreed to them.

The wife had judgment divorcing her from her husband and decreeing to her the custody and tutorship of the child, with reservation to the wife to recover her share of the community of acquets and gains.

The plaintiff appealed.

The disposition we shall make of this case renders it unnecessary to examine the bills of exceptions found in the transcript.

We have examined the testimony in this record with attention, and after due consideration we do not give to it the character and purport which seems to be attached to it by the contending parties. It is doubtless tinged to a considerable extent by the feelings and prejudices of relatives and friends, who have testified on either side. This is natural, and found in cases of this kind to be common. It is shown that the husband is addicted to the intemperate use of ardent spirits, and that when under its baneful influence he is passionate and spiteful; that when in a good humor he treated his wife kindly. Difficulties seem to have arisen between them frequently. The wife on one or two occasions left the common domicile and again returned. The witnesses speak of one or two reconciliations between them. This is denied by the counsel of the defendant, but we think the testimony does establish a reconciliation that took place in 1873. The wife, it is shown, was in the habit of using opium or morphine in considerable quantities; but we do not find that the evidence establishes that the use of these sedatives had any bad effects upon her of any sort. A lady, who testified in regard to the defendant's use of narcotics, says she knew her ten or eleven years, and knew nothing against her; "always considered her a very clever lady and her bearing good." In this instance is presented the common case of difficulties arising between a stepmother and children of the husband by a former wife. Such feuds are often sharp, and involve all the household in discord and wrangling. Several grown daughters of the plaintiff, it is shown, reside with him. Between them and his wife amicable relations, it seems, have not always been preserved. Often, no doubt, the conflicting feelings of the father and the husband may have been taxed to an

 Scott, Husband v. Scott, Wife.

extent beyond the power of his philosophy to maintain equanimity of temper. But surely these petulances and ebullitions that are constantly occurring in families are not troubles of so grievous a character that they are to be remedied only by divorce. The difficulties unhappily existing between the litigants, we infer from the evidence, have arisen mainly from this source. No grave and insuperable cause, in our judgment, exists justifying a decree of divorce. It was not the intention of the lawmaker that courts should be governed in their decisions of cases of this sort by the declarations and wishes of the parties themselves, acting under excitement and dissatisfaction. Their allegations of grievances insupportable must be made good by proof, to authorize the action of the judge. Trials and troubles from the infirmities of our nature constantly assail us, and it is our duty, as best we may, to bear up under them and overcome them if in our power. Something must be expected from the parties themselves, to overcome their domestic difficulties. It is not every family feud declared by husband or wife to be insupportable that will authorize a divorce. It is in the great interests of society that the conjugal relation should not be dissolved except upon weighty and well established reasons. The record before us we do not think presents such a reason.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

 No. 584.

HALL & TURNER, Agents, etc. v. TIMOTHY MOORING.

This is a petitory action against the defendant for certain lands. The only question is that of prescription. It is well settled that, to become the basis of prescription, the title must be apparently good, and of a kind calculated to induce a belief in the purchaser that it is perfect. A title defective in form can not be a basis of prescription. By this the law means a title on the face of which some defect appears, and not one that may prove defective by circumstances, or evidence *de hors* the instrument.

A possessor in good faith is one who has just reason to believe himself master of the thing he possesses, although he may not be in fact. In this instance, it is a question of fact, and there is nothing in the record to show that the defendant had any reason to doubt that his title was good, until the institution of this suit. Hence prescription lies in his favor.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Leonard*, judge *ad hoc*, in lieu of *Looney*, district judge, recused. *Land & Taylor*, for plaintiffs and appellants. *Egan & Wise*, for defendant and appellee.

LUDELING, C. J. This is a petitory action to recover lands situated

in the parish of Caddo. The only defense we will notice is the prescription of ten years.

It appears from the record that the defendant has a patent from the United States for a part of the lands in controversy, dated in April, 1843, and that he holds a title, perfect in form, to all the lands in question from N. E. Wright, agent of the heirs of Daniel Mosely, of Texas, dated twenty-eighth of January, 1859. This suit was instituted on the twenty-first of October, 1869, and the petition alleges that defendant took possession of the lands on the twenty-eighth of January, 1859. It is manifest that if the title from N. E. Wright, agent, is sufficient to enable one to prescribe under it, the only other inquiry will be the good or bad faith of the defendant.

Article 503 of the Civil Code declares "He is a *bona fide* possessor, who *possesses as owner* by virtue of an *act sufficient in terms to transfer property*, the defects of which he was ignorant of."

The act of sale was sufficient in terms to transfer the property, provided the agent who executed the deed had authority. The evidence on this point is that Thomas R. Mosely and Augustus Mosely, two of the heirs of Daniel Mosely, were appointed the agents of all the other heirs of Daniel Mosely, with extensive powers to settle up the succession in Texas and Louisiana; that Thomas R. Mosely for himself and for Augustus Mosely, acting as the agents of all the heirs of Daniel Mosely, of Texas, fully empowered N. E. Wright by public act to sell all the lands belonging to said heirs, situated in Louisiana, and that under said power of attorney said Wright did sell the lands in question and receive the price thereof. It is contended, however, that Thomas R. Mosely exceeded his powers in executing the power of attorney to Wright; and that therefore the defendant can not prescribe under that title. The fact stated, that Thomas R. Mosely exceeded his powers, is perhaps true. But the inference deduced from the facts, is illogical. The want of authority in Wright to sell the lands is the only defect in defendant's title. If that defect did not exist, his title would be perfect, without the help of prescription. The defendant's title is apparently perfect; so is the mandate of Wright. The defect complained of is *de hors* both acts; and was only made manifest on the trial of this case. "It is well settled that to become the basis of prescription, the title must be apparently good, and of a kind calculated to induce a belief in the possessor that it is perfect. A title defective in form can not be a basis for prescription. By this, the law means a title on the face of which some defect appears, and not one that may be found defective by circumstances or evidence *de hors* the instrument." 3 R. 220.

Did the defendant possess in good faith? A possessor in good faith

is one "who has just reason to believe himself the master of the thing he possesses, although he may not be in fact." C. C. 2451; 503. It is a question of fact, and there is nothing in this record to show that the defendant had any reason to doubt that his title was good, until the institution of this suit. In *Dufour v. Canfranc*, this court said: "Good faith is ordinarily tested by inquiring whether the defect in the title proceeds from a vice in form or a want of right in the person who conveyed; in other words, if it is an error in fact, or an error in law, under which the purchaser holds the object claimed." Pothier tells us that a just title is that which is of a nature to transfer the property; so that when it is not transferred, it is a defect of right in the person who makes it, and not a defect in the title, in consequence of which the tradition is made." 11 Martin (975) 714.

It is contended that as Wright did not act in his own name, but as agent for others, the defendants can not acquire by prescription under his title; that it is either a legal title or an absolute nullity, under which no rights can be acquired; and that he is not a possessor in good faith, because "a possessor in good faith is one who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." This error results from confounding an illustration of the rule with the rule itself. C. C. 3451. And we can not see the legal distinction attempted to be made. There can be no greater obligation in the vendee to examine the verity of the statements in the written mandate of Wright than to inquire into the truth of the assertion of the seller that he is the owner. In both it would be an error of fact, "which the law would not consider of such a nature as to prevent the party from pleading prescription. The rule is that when the opinion of the possessor, who holds an object under a title of sale, has a just ground, though in fact there is no sale, the opinion is equal to title." 11 Martin, 714.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

521.

THE STATE OF LOUISIANA v. CHARLES GREEN *alias* HENRY GREEN.

There is no law of this State, nor any authority under our jurisprudence requiring a more definite description in an indictment for stealing money than the word itself imports.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Ray, J. O. T. Dunn, district attorney, for plaintiff and appellee. Robert James Caldwell, for defendant and appellant.

TALIAFERRO, J. The defendant was indicted for "stealing and

State v. Charles Green alias Henry Green.

carrying away seventy-five dollars of the goods, chattels and money of one Henry Matthew." He was tried on this charge, convicted and sentenced to two years imprisonment at hard labor in the penitentiary. From this judgment, inflicting this punishment, the defendant has appealed.

It appears from a bill of exceptions in the record that objection was made and overruled by the judge to the admission of the answer of a witness to a question by the district attorney, which answer was "a roll of bills tied up in a string." The objection was that no particular kind of money was charged in the indictment; that the State could not prove what kind or species of money was taken unless it was charged in the indictment, and under the general allegation of money no particular kind of money could be proved. On these grounds a motion was made in arrest of judgment.

We are not referred to any law of this State or any authority under our jurisprudence requiring a more definite description in an indictment for stealing money than the word itself imports, and we are aware of none. We think the defense without weight.

It is therefore ordered that the judgment appealed from be affirmed. Rehearing refused.

No. 548.

E. D. DUCKWORTH v. W. H. VAUGHAN, Public Administrator, et al.

The plea, in this instance, that the lands were not surveyed and sold in lots as required by the constitution, can not be maintained. It is true that a survey of the lands was not made, but they were divided up into lots as required by law, and the lots were appraised separately; the lots were described according to the survey made by the government, and the sale was made in lots. This was sufficient.

The fact that the lands were sold under the last inventory ordered by the court instead of the first, is no ground for annulling the sale.

The order of the court having jurisdiction of the succession, which ordered the sale during the provisional administration of the public administrator, has not been appealed from, and is not an absolute nullity. Purchasers in good faith need not look beyond the order of sale made by a court having jurisdiction of the succession. They are not affected by antecedent irregularities. The jurisprudence on this point is settled.

The note sued upon is not prescribed. The name of the former administrator indorsed on it on the twenty-eighth of December, 1868, and the placing of this claim on the tableau, arrested the current of prescription, and it has not since acquired.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiff and appellant. *Newton & Hall*, for defendants and appellees.

WYLY, J. Plaintiff, a creditor of the succession of E. P. Overby sues the defendant, its legal representative, on a note of deceased for \$1050; he also sues to annul the sale of the lands described in the

petition, which were sold pursuant to an order of the parish court having jurisdiction of said succession, on twenty-eighth January, 1871. The grounds of nullity are :

First—That at the time the order of sale was granted and at the time of the sale, the defendant, the public administrator, only held provisional administration of the succession of E. P. Overby, pending a contest for the administration between G. W. Kimbrough and Mrs. M. E. Overby ; that while thus holding, a sale ordered to be made by the parish court was an absolute nullity.

Second—That the inventory under which the lands were sold was not the first inventory, but one made by order of the court a few days before the sale.

Third—That the lands were not surveyed and sold in lots as required by the constitution.

It is true a survey of the lands was not made, but they were divided up into lots as required by law, and the lots were appraised separately; the lots were described according to the survey made by the government, and the sale was made in lots. This was sufficient. The fact that the lands were sold under the last inventory made by order of the court, is no ground for annulling the sale.

The public administrator was administering the succession, and the order of the court having jurisdiction of the succession directing the sale, has not been appealed from, and it was not an absolute nullity. Purchasers in good faith need not look beyond the order of sale made by a court having jurisdiction of the succession. They are not affected by antecedent irregularities. The jurisprudence on this point is settled.

We regard the sale as valid, and conclude that the demand to annul it is not well founded. Plaintiff, however, is entitled to judgment on the note to be paid in due course of administration.

The note is not prescribed. The name of the former administrator indorsed on it on twenty-eighth December, 1868, and the placing of this claim on the tableau arrested the current of prescription, and it has not since acquired.

It is therefore ordered that the judgment appealed from be annulled, and it is decreed that the demand to annul the sale of the lands described in the petition be rejected. It is ordered that plaintiff recover judgment against the succession of E. P. Overby for one thousand and fifty dollars, with eight per cent. interest thereon from first January, 1865, to be paid in due course of administration. It is further ordered that said succession pay costs in both courts.

Rehearing refused.

Copley v. Dinkgrave.

No. 559.

M. A. COPLEY, Administratrix v. DORCAS DINKGRAVE.

This is a petitory action for a tract of land. The plaintiff bases her title on a patent in her favor, issued by the United States, for the lands in controversy. The defendant claims by location of an internal improvement warrant; the plaintiff by virtue of the act of 1851, giving *bona fide* purchasers from Maison Rouge a preference in purchasing from the United States. Each party displays a chain of title from Cox, holding under Maison Rouge, down to Copley. The tract of land was acquired by Brigham from Cox. He improved and cultivated it as a whole for several years before he sold it. It was then divided and owned by two different persons, and lastly Copley became owner of the whole tract as an entirety, in the same manner that Brigham owned it after the purchase from Cox. If Brigham had remained owner, there is no doubt he could have entered the entire tract at the minimum government price. If so, when the two divided halves of said tract were reunited in Copley as one owner, and the same status existed as when Brigham owned the entire tract, there can be no forcible reason why cultivation and improvement upon any portion of the entire tract, whether upon the upper or the lower half, at the time when division existed, did not carry with it the right to purchase the whole of it at government price.

Copley was owner of the entire tract in 1844, and cultivated upon it several years before 1849. This entitled him to the benefit of the provisions of the act of Congress, enacted in the interest of persons who purchased lands in the Maison Rouge grant under the title of Cox.

If frauds were perpetrated and malpractices resorted to by Copley in procuring transfers to himself, they were acts that took place seven years at least before the defendant's alleged purchase and settlement. These frauds, if they were frauds, did no injury to the defendant. If injury resulted to anybody, it was to the parties with whom he dealt; but thirty years have intervened, and it does not appear that either they or any of their heirs have ever complained.

Under the act of Congress of twenty-seventh January, 1851, all the lands within the limits of the Maison Rouge grant were reserved from sale, entry or location, from the date of the act until three months after the public notice required to be given by the second section of the act. That notice was not given until the twenty-fifth of October, 1853. Hence, on the fifth of September, 1853, the defendant was debarred from making a location of her internal improvement warrant upon any land within the limits of the Maison Rouge grant; and subsequently, in December, 1854, and on the twenty-first of January, 1855, when she again applied to locate it, it was out of her power to locate it upon the lands in controversy, because before her last applications were made, those lands had been secured to plaintiff under pre-emption right in pursuance of the provisions made by law in favor of purchasers in good faith under the title of Cox, and who had improved and cultivated those lands. Therefore, defendant never acquired any title and plaintiff did.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farrar*, for plaintiff and appellee. *Franklin Garrett & Baker*, for defendant and appellant.

TALIAFERRO, J. This case was before us at the July term of this court at Monroe, in 1873, on the appeal by the defendant from a judgment of the lower court sustaining the plea of *res judicata*, filed by the plaintiff. The judgment then appealed from was annulled and the case remanded, to be tried on the merits.

On trial had on the remanding, judgment was rendered in favor of the plaintiff for the land but refusing her claim for rents. The defendant has appealed. Plaintiff prays an amendment of the judgment giving her rents.

Copley v. Dinkgrave.

The action is a petitory one. The plaintiff bases her title on a patent, in her favor, issued by the United States for the lands in controversy.

The defendant answers, denying any right in plaintiff to the land claimed by her, and avers that the United States patent claimed under was illegally and erroneously issued to the heirs of G. W. Copley, and was procured by fraud and ill practices. The defendant claims by location of an internal improvement warrant, numbered 773. The plaintiff, by virtue of the act of 1851, giving *bona fide* purchasers from Maison Rouge, a preference in purchasing from the United States.

In being again called to consider this vexed and long continued litigation, we can not but be forcibly impressed with the fact presented by a voluminous record, containing all the proceedings that took place in the controversy before the various officers of the land department constituted by the laws of the United States, judges authorized to determine such contests, that the plaintiff was successful, and obtained the award in her favor by the successive decisions of the various officers of the land department before whom the case was carried, by the provisions of law, culminating at last by the judgment of the Secretary of the Interior. It certainly warrants the inference that justice was attained in the case when the parties had such ample means and time allowed them to exhibit their claims and present their evidence. It seems scarcely practicable that fraud could have escaped detection, had it been resorted to by either of the parties, when each was lynx-eyed, keen and active in the promotion of her own claims; nor that during the several trials on the several appeals, errors could have crept in before the several tribunals in which the parties were heard; tribunals peculiarly qualified to judge and determine all the questions arising in the litigation. These considerations seem to have entered the mind of the judge *a quo*, and to have borne much weight in the formation of his decree in the case.

It becomes our duty, however, to hear the defendant upon her allegations of unfairness, fraud and ill practices, by which she avers the plaintiff obtained judgment in the contest before the land department.

We understand the defendant as laying the *gravamen* of her case upon the allegation of fraud in George W. Copley, in obtaining the recognition by the government of a right to purchase at the minimum price, the lands in controversy, when in truth he had no such right; that his pretensions to such right was fictitious, and entitled to no respect, and, therefore, his claim so set up should be rejected.

Secondly, we understand her as complaining that wrong and injury have resulted to her from the refusal of the officers of the land department to recognize the location of the internal improvement warrant, which location she alleges she made.

Each party displays the claim of title from Cox down to Copley, of eight hundred and sixty arpents of land to be taken from the upper side of lot No. one, in the Maison Rouge grant. But the defendant claims no right under that title. Coming down to the sale of the land under a foreclosure of mortgage on the twentieth of August, 1838, it appears that a division of the land took place, by agreement and by the coroner's deed to the purchasers, Fenner and Scarborough, title was made to Fenner of the upper half of the tract and to Scarborough of the lower half. Fenner, it seems, sold his half to Caldwell, and Caldwell sold to Brigham. It was next sold by the coroner under a judgment against Joseph and Brigham, and purchased by Smith, who sold to Copley, who thus acquired title to the upper half. Under a judgment against Scarborough, his half of the land, being the lower half, was sold at sheriff's sale, and purchased by James Garrett, who sold to Copley who, in this manner acquired title to the lower half and became owner of the whole tract. It seems that the land claimed by Mrs. Dinkgrave and in controversy in this suit, lies on the lower half of the tract. It is denied on the part of the defendant that there were any improvements or cultivation on the lower half, and therefore no right accrued to any of the parties under the provisions of act of Congress giving to purchasers under the Cox title the privilege of entering the land so purchased at the minimum rate, because improvement and cultivation were required as a condition upon which the privilege was granted.

On the other hand, it is contended that the tract of eight hundred and sixty arpents was acquired by Brigham, in his purchase from Cox, as one tract; only that he improved and cultivated it as a whole for several years before he sold it. It was as we have seen, subsequently divided and owned by two different persons, and lastly, that Copley became owner of the whole tract as an entirety, in the same manner that Brigham owned it after his purchase from Cox. There can be no doubt that if Brigham remained owner, he could have entered the entire tract at the minimum government price. Then, say the plaintiff's counsel, when Copley became purchaser of the lower half and the separate ownerships of the halves were blended in Copley as one owner, and the same status existed as existed when Brigham owned the entire tract, cultivation and improvement upon any portion of the entire eight hundred and sixty arpents, whether upon the upper or the lower half, carried with it the right to purchase the whole at government price. We can see no forcible objection to this reasoning. The entire tract, as purchased from Cox, was never actually divided by a survey. No line of demarcation, it seems, was ever run and established, indicating with precision which was the upper half or which

the lower half. There never was a time when, as between claimants and the United States, there was a separate claim set up in virtue of improvement and cultivation, to one-half of the eight hundred and sixty arpents as the upper half, and a like claim set up for the like reason on the other portion as the lower half. The government never had to deal with claimants, one portion of whom set up right to four hundred and thirty arpents of these eight hundred and sixty arpents by virtue of their purchase from Cox, and improvements and cultivation by them on those four hundred and thirty arpents, and another portion who set up on the same grounds precisely their claim to the other four hundred and thirty arpents. Had Brigham, for instance, never parted with his rights upon the entire tract he purchased from Cox, and limited his application under the benefit of the act of Congress to only half the number of arpents he bought from Cox, and that half, the one on which his improvements were made and his cultivation carried on, then, having abandoned all claim upon the other half any other claimant to that half would have to establish separate improvement and cultivation on that half. Brigham might have purchased from the government all that he purchased from Cox, or any part thereof, in virtue of his improvements and cultivation upon the land as an entire tract, limiting his claim, however, in case of taking less than the whole to such part of the entire tract as embraced his improvements. Copley, it is shown, was owner of the whole tract in 1844, and that he cultivated upon it several years before 1849. This we are of opinion entitled him to the benefit of the provisions of the act of Congress enacted in the interest of persons who purchased lands in the Maison Rouge grant, under the title of D. N. Cox. We regard it therefore of little moment whether or not Copley made improvements upon that portion of the tract which, during the separate ownerships before referred to, was called the lower half. The testimony on that point is contradictory.

On the part of the defense, there are numerous other objections raised to the validity of the title by which the plaintiff claims the property in controversy. Good faith in Copley in acquiring title and want of consideration as shown by several of the transfers, it is argued, render these transfers null. The denial by the plaintiff of any right in the defendant to set up these objections is, perhaps, not without force. If fraud were perpetrated and malpractices resorted to by Copley in procuring transfers to himself, they were acts that took place seven years at least before the defendant's alleged purchase of an improvement and settlement upon the lands began. These frauds, if they were frauds, did no injury to the defendant. If injury resulted to any body it was to the parties with whom he dealt; but thirty years have

intervened and we do not find from the records that any of these parties or the heirs of any of them have ever complained. But conceding the right to the defendant to except to the validity of those acts, we are not prepared, under all the facts shown in relation to them, to pronounce their nullity.

The title presented by the defendant we will now advert to. Her title is based upon an alleged location of an internal improvement warrant on the land in dispute. The fact of such location ever having been made by the defendant, is expressly denied by the plaintiff. The defendant makes no pretension to any other right.

By an act of Congress, passed September 4, 1841, the United States made a donation to Louisiana and other States of large portions of the public domain for the purpose of internal improvement. This State, in subsequently disposing of these lands, adopted the method of selling warrants, termed internal improvement warrants, which were located by the purchaser or his assignee. But the selection of the lands donated to the States was made under the supervision of the Land Department of the Government and subject to its approval. The commissioner of the general land office, in August, 1847, issued instructions to the registers and receivers in regard to the selection or location of internal improvement land under the donation act of 1841. Through the officers of the land department the construction given by the executive department to the act of 1841, was made known. Instructions were issued, defining the mode of proceeding in the selection and location of the lands to be transferred to the States. It was announced through the land department "that the law allowed selections to be made of public lands, whether offered or unoffered, but no State selection is admissible of any land which is or may be reserved from sale by any law of Congress, or proclamation of the President, or on any tract which is reserved or withdrawn from market for any purpose." *Lester's Land Laws*, vol. 1, p. 502. We think it is clearly shown that under the act of Congress of twenty-seventh January, 1851, all the land within the limits of the Maison Rouge grant was reserved from sale, entry or location, from the date of the act until three months after the public notice required to be given by the second section of the act; that that notice was not given until the twenty-fifth of October, 1853. The location of the defendant's warrant could not, therefore, have been made on the fifth of September, 1853, because it was then forbidden by the law of Congress above recited.

We consider it unnecessary to consider the bills of exceptions presented by the record. We come to the conclusion that no location of the internal improvement warrant of the defendant was made.

For the reasons just stated, we think it clear that on the fifth of September, 1853, the defendant was debarred from making a location of her internal improvement warrant upon any land within the limits of

the Maison Rouge grant; and that subsequently, viz: in December, 1854, and on the twenty-first January, 1855, when she again applied to locate it, it was out of her power to locate it upon the lands in controversy, because before her last applications were made, those lands had been secured to the plaintiff under pre-emption right in pursuance of the provisions made by law in favor of purchasers in good faith under the title of Cox, and who had improved and cultivated upon those lands.

It was the express purpose of the enactment to first ascertain and provide for all persons of that class by receiving proof of their claims and confirming the right of pre-emption upon them. Pending this period entries of lands on other claims within the grant were suspended, and locations of warrants could not be effected. We conclude the defendant never acquired title, and that the plaintiff did.

It is therefore ordered that the judgment of the district court be affirmed with costs. The right to claim rents and revenues is reserved to the plaintiff in a separate action.

Chief Justice Ludeling recused in this case.

Rehearing refused.

No. 553.

G. W. MCGINTY v. W. L. RICHMOND, Sheriff, et al.

The exception to the jurisdiction of the district court was properly maintained. The execution having issued from the parish court, the parish court was the proper court to apply to for an injunction to restrain property seized under the judgment from being sold. The value of the property to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of the property not subject to seizure.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. C. T. Dunn*, for plaintiff and appellant. *Newton & Hall*, for defendants and appellees.

MORGAN, J. Leopold, having a judgment against McGinty, which was rendered by the parish court, issued execution and caused a certain piece of property to be seized.

McGinty obtained an injunction from the district court alleging that the property seized was his homestead and not liable to seizure. Exception was taken to the jurisdiction of the district court. The exception was properly maintained.

The execution issued from the parish court; the parish court was the proper court to apply to for an injunction to restrain property seized under the judgment from being sold. The value of the property sought to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of property not subject to seizure.

Judgment affirmed.

No. 486.

JOHN CHAFFE & BROTHER v. JOHN T. LUDELING et als. W. J. Q. BAKER, intervenor.

This court is satisfied that the document sued on is the property of plaintiffs and not of the intervenors, by whom it was transferred, and not merely pledged to plaintiffs, as he alleges, to guarantee the payment of the indebtedness of a third party.

The position taken by the intervenor that the obligation sued on was not stamped when it was delivered to plaintiffs, and that it is therefore a *nudum pactum*, is entirely untenable. If he gave them the obligation without being stamped when stamps should by law have been placed upon it, it was a wrong doing of his own from which he can draw no protection. Besides, the plaintiffs had the right to cause the required stamps to be put upon it. The requirements of the law are complied with, if the stamps are on the obligation, when sought to be enforced.

Allegations that intervenor, when he parted with the obligation, which was negotiable, and of which he claims the ownership, did so despite the agreement he was under with his associates to keep it out of commerce, can do him no good, and he can not be listened to on this point.

It is conceded that the defendants, with others, at sheriff's sale, purchased all the rights, privileges, franchises and other property belonging to the Vicksburg, Shreveport and Texas Railroad Company. This company was a corporation established by law. As a corporation thus established, its members were not personally responsible for the debts of the company beyond the amount of stock which they individually held.

As to the defendants, they did not acquire by their purchase the immunity of the stockholders of that company from liability beyond the amount of their stock. This purchase conveyed to them all the rights, privileges, franchises and other property of said company; but it did not and could not make them a corporation, for corporations are created only by special act of the Legislature, or in the manner provided for by law. As regards the rights, privileges, franchises and other property of the company aforesaid, the purchase made defendants joint owners thereof and nothing else. It did not make them that company.

If, as alleged, the ratification of the sale by the State constituted them a corporation, their corporate rights would take effect only from the passage of the act. But the act was passed subsequently to the publishing of the instrument sued upon. The rights of the holders of the obligation had vested, and the Legislature could not shake them.

Defendants' plea that the obligation sued on purports to have been issued by the Vicksburg, Shreveport and Texas Railroad Company, and therefore that they, the defendants, can not be liable individually, does not protect them. Obligors are bound not by the style which they give to themselves, but by the consequences which they incur by reason of their acts.

It was sufficient that the instrument sued upon was stamped when offered in evidence.

This court can neither add to the law nor take from it, and as the law limits the solidarity of obligors engaged in carrying personal property for hire to that property which is carried on ships, or other vessels, it can not be extended to those who carry it on a railroad. Hence the defendants are liable jointly, and not *in solido*.

It appears that others besides the present defendants are the owners of this road. Their names were given to the plaintiffs by the defendants. They should have been made parties to the suit. The owners are nine in number. Judgment is therefore rendered in favor of the plaintiffs and against the defendants for the proportion due by each.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Robert J. Caldwell, attorney at-law, selected to try this case. Morrison & Farmer, for plaintiffs and appellees. W. J. Q. Baker, *in propria persona*, intervenor and appellant. Frank P. Stubbs, for defendants and appellants.

MORGAN, J. John T. Ludeling, John Ray, Francis P. Stubbs and William R. Gordon, are sought to be made responsible *in solido* upon the following instrument:

Chaffee & Brother v. Ludeling et als.

Office of the Vicksburg, Shreveport and Texas Railroad Company,
\$5168 08. Monroe, La., November 6, 1866.

On or before the third February, 1869, the Vicksburg, Shreveport and Texas Railroad Company will pay to the order of Wesley J. Q. Baker five thousand one hundred and sixty-eight dollars and eight cents, value received, with eight per cent. interest per annum from the third day of February, 1866, till paid, payable annually.

Signed,

JOHN T. LUDELING, President.

Attest :

Jos. P. McGUIRE, Secretary.

Defendants' responsibility is claimed upon the allegations that on the third February, 1866, they purchased the Vicksburg, Shreveport and Texas Railroad at sheriff's sale, and that previous to the purchase they formed themselves into an association for the purpose of buying the railroad in question and operating it in carrying freight and passengers for hire. This, plaintiffs say, constituted them common carriers and commercial partners. Upon this ground judgment is asked against them *in solido*.

Defendants excepted, first, that the maker of the instrument, the Vicksburg, Shreveport and Texas Railroad Company, a corporation created by and according to law, is alone liable thereon, and not the individual stockholders, of whom defendants are only a portion; second, that defendants, if liable at all, are only jointly so with all the other stockholders of the company, who have not been sued; third, they plead the prescription of three and five years. The exceptions were overruled, and, without waiving them, but on the contrary reiterating them, they answered, admitting that the obligation sued on was signed by Ludeling as President of the Vicksburg, Shreveport and Texas Railroad Company, "a company chartered by the acts of the Legislature of the State of Louisiana, and that it was countersigned by the Secretary of said company, who affixed the seal of the company thereto, but they deny that they are or ever were individually liable in any manner under said obligation."

As between the plaintiffs and the defendants the serious questions presented for our solution are—

First—Are the defendants, individually, liable on the obligation sued upon?

Second—If liable at all, is their liability solidary or joint?

Before entering upon the consideration of these questions, we must investigate the pretensions of the intervenor W. J. Q. Baker. He alleges that he, and not the plaintiff, is the owner of the obligation sued on. If he is, of course the suit is at an end. He alleges that the obligation was made in his favor and intended to be between them and

the defendants and others a statement of accounts among themselves; that when he gave it to plaintiffs it was not stamped, and that they were never authorized to put stamps upon it. He shows that it was given to plaintiffs by him as security for a debt due by Mrs. Wilson; that this debt of Mrs. Wilson was never ascertained; that if it ever existed it is extinguished by payment and prescription; that they took no steps to secure the debt or keep it alive, and made no effort to protect the surety, and abandoned the whole claim; that they have no right to bring this suit until they have shown contradictorily with Mrs. Wilson the amount of her indebtedness. He prays that the suit be dismissed; that the indebtedness of Mrs. Wilson be declared prescribed and discharged by her bankruptcy, and, if the suit is not dismissed, that the obligation sued on be declared to be his property, and that it be delivered to him.

Baker was the holder of the document sued upon. It was made payable to his order. It was in negotiable form. He does not deny having pledged it to the plaintiff. It was pledged to secure the debt of a third party. But the act of pledge was a voluntary one on his part, and it was competent for him to make it. The indebtedness for which it was pledged was acknowledged by him, and it had been contracted by him. He can not be listened to now when he denies it.

The evidence satisfies us also that he subsequently transferred the obligation which had before been pledged to the plaintiffs in full property and in satisfaction of this indebtedness. He swears he did not. But his testimony is contradicted by several witnesses. Shortly after the transfer he went into bankruptcy. To enable him to receive the benefit of the bankrupt law, it was necessary that he should file a schedule of all his property, and to swear to the fidelity of his return. If the obligation sued on was only in pledge with the plaintiffs, it was still owned by him. He had a residuary interest in it, and upon his, or his assignee, paying the amount for which it stood pledged, it would have been returned to him or to his assignee. He did not place it upon his schedule. As he swore to the truth of his return, if he did not place it on that return, the only charitable conclusion that we can come to is that it was not his property.

His position that, because the obligation sued on was not stamped when it was delivered to the plaintiffs, it is therefore a *nudum pactum*, is entirely untenable. If he gave them the obligation without being stamped when stamps should by law have been placed upon it, it was a wrong doing of his own from which he can draw no protection. Besides, the plaintiffs had the right to cause the required stamps to be placed upon it. The requirements of the law are complied with if the stamps are upon it when it is sought to be enforced.

It is sufficient for us to know that they are upon it when the case comes before us for investigation. The statement that, when the obligation was given to him it was not stamped because it was only intended as a memoranda of settlement between himself and those interested with him in the railroad, and that they were purposely left off it, that it should not be negotiated or transferred, does him no good. It only shows that he parted with the obligation despite the agreement he was under with his associates to keep it out of commerce. Under no hypothesis can he be listened to when he claims ownership of the obligation. His intervention, therefore, must be dismissed.

This brings us to the case between the plaintiffs and the defendants.

It is conceded that the defendants, with others, bought at sheriff's sale the property of the Vicksburg, Shreveport and Texas Railroad. To state the case more broadly, it is conceded that the defendants, with others, at sheriff's sale purchased all the rights, privileges, franchises and property belonging to the Vicksburg, Shreveport and Texas Railroad Company. This company was a corporation established by law. As a corporation thus established its members were not personally responsible for the debts of the company beyond the amount of stock which they individually held.

Now the question propounded to us is: When Ludeling and others purchased the rights, privileges, franchises and property belonging to the Vicksburg, Shreveport and Texas Railroad, did the immunity of the stockholders of that company from liability beyond the amount of their stock attach to them?

The question, we think, must be answered in the negative. The purchase of Ludeling and his associates conveyed to them all the property of the corporation which was sold by the sheriff. It conveyed to them the privileges and the franchise of the corporation, its powers to operate the railroad, etc. The sheriff's sale made them the owners of the road, its right of way, its property, its franchise, but it did not, and could not, make of them a corporation, for corporations are created only by special act of the Legislature or by associations under the general law regulating the mode in which corporations are formed. This sale conveyed to them the title to the rights and property of the company, but, as regards those rights and that property, it made them joint owners thereof, and nothing else. In other words, the sheriff's sale to Ludeling and his associates of the property, rights, privileges and franchise of the Vicksburg, Shreveport and Texas Railroad Company did not make of them that company. It only conveyed to them, in joint ownership, the property which they bought.

It is contended that the Legislature of the State, by subsequent act,

ratified this sale. This is true. But no one here disputes the verity or validity of the sale. If this act of ratification, besides the ratification, constituted them a corporation, their corporate rights would take effect only from the passage of the act. The act was passed subsequent to the publishing of the instrument sued upon. Its effect was not and could not be retroactive. The rights of the holders of the obligation had vested, and the Legislature could not shake them.

The defendants have referred us to many decisions of the courts of England and of our sister States, collected in Redfield on Railways, in support of their defense. So far as we have been enabled to examine them, they do not apply. They relate to the power to sell railroads under mortgages, their franchises, and the right to operate them, none of which are questioned in this controversy.

They also contend that the obligation sued on purports to have been issued by the Vicksburg, Shreveport and Texas Railroad Company, and therefore payment can not be exacted of them individually. This does not, in our opinion, protect them. Obligors are bound not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. It matters not what they chose to call themselves. The question is, how do their acts bind them?

They next contend that the document sued on should not have been received in evidence, because it was not property stamped when issued. It was stamped when it was offered in evidence, and this we think is sufficient. The last defense set up is prescription. But it was not urged in argument, and it can not avail them. The note was due in February, 1869; this suit was instituted in 1872. The only remaining question is the extent of the defendants' liability. Are they bound solidarily or jointly?

Plaintiffs contend that they are each bound for the entire debt, they being engaged in carrying personal property for hire. The code declares that commercial partners are those who are engaged in "carrying personal property for hire in ships or other vessels."

In this sense we understand vessel to mean any structure which is made to float upon the water, for purposes of commerce or war, whether impelled by wind, steam or oars. *Vide Webster's dictionary, verbo: vessel.*

Now it seems absurd that, if two or more persons should associate themselves together for the purpose of conveying personal property for hire between two points on some of the streams in Louisiana too shallow for navigation except in small boats propelled by oars, they would be bound, with regard to everything connected with such employment, *in solido*, while the operators of a railroad are only bound jointly. But we can neither add to the law nor take from it, and as

Chaffe & Brothier v. Ludeling et als.

the law limits the solidarity of obligors engaged in carrying personal property for hire to that property which is carried on ships or other vessels, we can not extend it to those who carry it on a railroad. We therefore conclude that the defendants are liable jointly and not *in solido*.

Now it appears that others besides the present defendants, are owners of this road. Their names were given to the plaintiffs by the defendants. They should have been made parties to the suit. The owners are nine in number. Judgment must therefore be rendered in favor of the plaintiffs and against these defendants for the proportion due by each.

It is therefore ordered that the judgment of the district court be amended, and that each of the defendants herein pay one-ninth part of the judgment herein, and as amended the judgment be affirmed, appellees to pay costs of appeal.

WYLY, J., *concurring*. The plaintiffs sue the defendants, John T. Ludeling, John Ray, Francis P. Stubbs and William R. Gordon, on the following instrument:

“Office of the Vicksburg, Shreveport and Texas Railroad Company,
\$5168 08. MONROE, La., November 6, 1866.

“On or before the third day of February, 1869, the Vicksburg, Shreveport and Texas Railroad Company will pay to the order of Wesley J. Q. Baker five thousand one hundred and sixty-eight dollars and eight cents, value received, with eight per cent interest per annum from the third day of February, 1866, till paid, payable annually.

“JOHN T. LUDELING, President.

“Attest: Jos. F. McGUIRE, Secretary.”

They allege that said defendants and their associates on the third day of February, 1866, “purchased the Vicksburg, Shreveport and Texas Railroad at sheriff’s sale, with all its rights, privileges, franchises, locomotives, cars,” etc.; that previous to said purchase they formed themselves into an association for the purpose of buying said railroad and operating it in carrying freight and passengers for hire as common carriers and commercial partners; that, immediately after said purchase, they took possession of and operated the railroad in said capacity, sometimes under the name of John T. Ludeling and associates, at other times under the name of the Vicksburg, Shreveport and Texas Railroad Company. They further allege that, by their repeated acknowledgments and declarations, the defendants induced others, as well as your petitioners, to deal with them and accept their paper under the assurance that they were bound *in solido*, thereby

assuming this responsibility toward third persons; that while the defendants were so associated together for the purpose aforesaid, they issued the promissory note sued on. They further allege that said John T. Ludeling was by the consent and authorization of the defendants authorized and empowered to execute said note, for which they are bound *in solido* to petitioners, who acquired it for value before due. The prayer of the petition is for judgment *in solido* against the defendants for the amount of said note.

Defendants, in a peremptory exception, urged—

First—That the maker of the instrument, the Vicksburg, Shreveport and Texas Railroad Company, a corporation created by, and according to law, is alone liable thereon, and not the individual stockholders, of whom defendants are only a portion.

Second—That defendants, if liable at all, are only *jointly* so with all the other stockholders of the company, who have not been sued, and whose names are disclosed in the exception.

The exception being overruled, defendants, reiterating the same defenses in their answer, further deny that the plaintiffs are the legal owners or holders of the paper, and in good faith. They aver that Baker made a surrender in bankruptcy, and though this was not placed upon his schedule of assets, nor taken possession of by the assignee, E. E. Norton—yet, that it was legally the property of said assignee; that defendants had equities against said Baker, and plaintiffs held other collaterals for the debt of Mrs. Wilson, for whose debt to them the note sued on was delivered to them to secure. They set up the circumstance under which this paper was executed—as being when the purchasers of the railroad agreed among themselves to bid for the property, each of them paid into a common fund the sums they had agreed to furnish, respectively, with the agreement that whatever balances might remain after the purchase was complete the same should be loaned to the company for repair and construction purposes; that among the various balances was the sum of the paper sued on in favor of Baker, and all the other purchasers had similar papers executed for the balances respectively due them, which it was agreed among all should be held as simple memoranda of the agreement, and that purposely, and to prevent their use, none of these several instruments were stamped with the United States revenue stamps, necessary for the validity of a promissory note; and that the said note sued on is extinguished by compensation between the purchasers, who hold similar obligations, in the event they, and not the Vicksburg, Shreveport and Texas Railroad Company, are held liable, which however they deny.

W. J. Q. Baker intervened and claimed the ownership of the note

in suit. The court gave judgment dismissing the intervention and condemning the defendants as prayed for. The defendants and the intervention have appealed.

The defendants contend that, by their judicial admission in this case, the plaintiffs are estopped from denying their authorities to act under the charter of the Vicksburg, Shreveport and Texas Railroad Company and to execute the note sued on in the name of said corporation; and therefore the defendants' exception that the suit should have been brought against said corporation and not against them, the individual stockholders, should have been maintained and the suit dismissed.

The judicial admission relied on is the averment in plaintiffs' petition that the "said defendants and their associates on third February, 1866, purchased the Vicksburg, Shreveport and Texas Railroad at sheriff's sale, with all its rights, privileges, franchises, locomotives, cars," etc.

This is an admission that the defendants bought all the property of the corporation; but it is not a judicial admission that they became thereby the corporation itself, acquiring power to bind it by issuing obligations or notes of the kind in suit.

On the contrary, in other allegations of their petition, the plaintiffs aver that the defendants were operating said railroad merely as common carriers and commercial partners at the time they executed said notes; and it was for this reason that suit was brought against the defendants individually. The plaintiffs have not judicially admitted that the defendants, when they executed the note in the name of the Vicksburg, Shreveport and Texas Railroad, represented that corporation and had authority to execute the note in behalf thereof. The court did not err in overruling the exception to the form of the action. The note was executed by the defendants; it matters not what name they assumed for their firm or association. It was not the obligation of the insolvent corporation, the Vicksburg, Shreveport and Texas Railroad, whose property the defendants acquired at sheriff's sale on third February, 1866. They purchased the property of the juridical person, but not the being itself. The defendants contend that the plaintiffs are without interest and can not raise the question whether they represented the Vicksburg, Shreveport and Texas Railroad when they executed the note in suit. In pursuing the makers of the obligation the plaintiffs have an interest (when met by the objection that the note is not theirs but that of a certain railroad corporation), to deny that it was issued by such corporation, to deny that the defendants had authority to represent said corporation in issuing said note, and to show that they issued it merely as a firm or commercial partnership.

In order to make out their case the plaintiffs clearly had the right to show that the defendants contracted the obligation as a firm or partnership and not as a railroad corporation, because they never had authority as such. In order to determine whether the equities set up by the defendants can be considered, it becomes important to ascertain whether the plaintiffs acquired it as owners or as pledgees before due and for value in due course of trade. They acquired it as pledgees before due, as will appear by the following document :

"NEW ORLEANS, January 27, 1868.

"Received from W. J. Q. Baker a note of hand made by Eliza W. Warfield, dated May 3, 1867, for five thousand dollars, due and payable five years after date, bearing eight per cent. per annum interest, and said interest payable annually, paraphed *ne varietur*, June 3, 1867. Also a note signed by John T. Ludeling as President of the Vicksburg, and Texas Railroad Company, for five thousand and one hundred and sixty-eight dollars and eight cents, dated November 6, 1866, and payable on the third of February, 1869, to the order of Wesley J. Q. Baker and by him indorsed, said note drawing interest at eight per cent. per annum from the third day of February, 1866, until paid, interest payable annually ; which notes are held as collateral security for the indebtedness of Mrs. N. J. Wilson, which indebtedness was contracted by the said W. J. Q. Baker. JOHN CHAFFE & BRO."

The defendants contend that the debt for which the note was given in pledge was suffered to prescribe; and with the prescription of the principal debt, the right of the plaintiffs as pledgees ceased, and the note belongs to the pledger Baker, or his assignee in bankruptcy, against whom the equities they set up can be established.

To this the reply is that the indebtedness of Mrs. Wilson is not prescribed, because before prescription had acquired she made a voluntary surrender of her property in bankruptcy, placing plaintiffs on the schedule of her creditors for \$10,000, and this was a most solemn acknowledgment and judicial admission of the debt; and since then prescription has not acquired.

The defendants contend that plaintiffs' claim is described on the schedule of Mrs. Wilson as being evidenced by two promissory notes for \$5000 each, dated twenty-seventh February, 1867, whereas their claim is an account; therefore the acknowledgment referred to did not arrest the current of prescription.

The plaintiffs were the factors of Mrs. Wilson and kept an account against her. The two notes referred to in the schedule are items in that account. Instead of acknowledging the whole account, the bank-rup chose to acknowledge two items thereof.

If all the other items of the account were incorrect, certainly in the

most solemn manner she has judicially admitted the correctness of those items, the two notes of \$5000 each; and undoubtedly the current of prescription was arrested in regard to that part of the indebtedness of Mrs. Wilson to plaintiffs. And as long as there was an indebtedness or any part thereof, the pledge given by Baker remained in force.

The pledge was given to secure the indebtedness of Mrs. Wilson to plaintiffs, it matters not how evidenced; and my conclusion is that it remains unimpaired and in full force. Besides, I am satisfied from the evidence that Baker transferred the note to plaintiffs in settlement of the debt for which it was pledged. The want of stamps on the note, if it be true it was not stamped, did not affect its negotiability or impair the pledge.

The time to raise that objection was when it was offered in evidence in this case, at which time it was properly stamped. The note having passed into plaintiffs' hands before due, the equities set up by defendants can not be considered.

The unincorporated association of which defendants were members, although engaged in carrying persons and freight for hire on their railroad, was not a commercial partnership. It is only the carrying of personal property for hire in ships or other vessels by a partnership that makes it a commercial one. Revised Code, 2825. The defendants are therefore not bound *in solido*.

The judgment appealed from should therefore be amended so as to make the defendants jointly liable instead of solidarily.

For the foregoing reasons I concur in the decree rendered in this case.

No. 541.

J. P. SHULTZ v. JOSEPH MORGAN. JOHN CHAFFE & BROTHERS,
Intervenors.

It is of the very essence of the *dation en paiement* that delivery should actually be made. Neither a sale nor a *dation en paiement* can avail against an attaching creditor when there has been no delivery.

In this instance the intervenors were fully aware of the indebtedness of the defendant to the plaintiff at the time the defendant became indebted to them, and of his failing and insolvent condition at that time; and under this state of facts they may well be considered as having aided the defendant in his fraudulent designs to defraud the plaintiff's claim, first by taking a mortgage from defendant on his property, and subsequently by transfers of that property only a few days before the plaintiff's attachment was levied on the same property.

APPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J. Watkins & Fort*, for plaintiff and appellee. *A. B. George*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, being the holder of a promissory note for \$1771 in gold coin with interest thereon from the eleventh May, 1870, at eight per cent., executed by the defendant, instituted this action against him, proceeding by attachment and garnishment process, alleging that the defendant was in insolvent circumstances and about to dispose of a large portion of his property to defraud his creditors and to give an undue preference to some of them. Certain lands with the rents accruing from them were attached and one Dub-berty was cited as garnishee. The answers of the garnishee to interrogatories disclosed no indebtedness by him to the defendant. Chaffe & Brothers intervened, claiming ownership of the lands attached. The case was tried twice in the courts below with the same result, that of a judgment in favor of the plaintiff against both the defendants and the intervenors; from which judgment the intervenors alone have appealed.

The defendant in 1870 became indebted to the intervenors in the sum of \$5500, to secure the payment of which he mortgaged to them a portion of the lands which the plaintiff in this suit attached for the payment of his debt. The mortgage was recorded in the parish of Bienville on the tenth of June, 1870, before the establishment of the parish of Webster; and as provision is made in the act creating the latter parish, rendering it unnecessary for any subsequent recordation in the new parish of deeds already recorded in the parishes from which portions of territory had been taken to form the parish of Webster, the objection of the plaintiff that the mortgage does not appear on the records of that parish is without weight.

The defendant, on the twelfth of August, 1872, sold to intervenors two hundred and thirty-nine and sixty-two one hundredth acres of land, the consideration of which, as expressed in the deed, was the sum of \$2800 cash in hand paid. This deed was recorded on August 14, 1872. On the day following, the thirteenth of August, 1872, the defendant sold to the intervenors four hundred and forty acres of land, more or less, for the consideration, as expressed in the deed of conveyance, of the sum of \$2750 cash in hand paid. This deed was recorded on the same day it was executed. The attachment of the plaintiff was levied upon these lands on the twentieth of August, 1872, about seven or eight days after the time of the sale to the intervenors. It is admitted that the consideration of both the transfers was indebtedness of defendant to the intervenors, and it is otherwise established that the consideration of both conveyances was the indebtedness of the defendant to the intervenors, and that no money was paid by them.

At the time the defendant contracted the debt for which he is now sued, he was pecuniarily much embarrassed and his situation in this

respect it seems continued without any improvement up to the time this litigation commenced. The evidence makes it clear that at the time the intervenors obtained the mortgage and the titles they set up to the lands they knew the defendant was in failing and insolvent circumstances, and knew of the existence of the plaintiff's claim against the defendant, which had existed anterior to that of the intervenors.

It is admitted by the counsel of the intervenors that the vendor was not actually in possession as owner; that he did not live on either place; that both places were in possession of lessees; that the only delivery practicable was made. It is clear that no actual delivery of possession was made to the intervenors. They contend however that possession follows title by public act, as well in transfers by *dation en paiement* as in sales; that delivery followed title by the notarial act of sale to them by defendant, and that no further act of delivery was necessary; that the private act when recorded became authentic, and if possession did not follow title and vendee held precarious title, the only effect of the seizure was to force vendee to prove the reality and good faith of the contract. With these views we do not agree. It is of the very essence of the *dation en paiement* that delivery should actually be made. 3 M. 326, 269, and 12 La. 375.

In *Nellson v. Smith*, 12 La. 375, the case last referred to, it was held that neither a sale or a *dation en paiement* can avail against an attaching creditor when there has been no delivery. This doctrine is well settled. See 20 An. 282, *White v. Bird*, and 3 An. 280.

All the conditions required to enable a creditor to attach the property of his debtor who, unable to pay all his creditors, is aiming to give an undue preference to some of them to the injury of the others, meet in this case; the insolvency of the defendant at the time of his transfers of property to the intervenors, the existence of plaintiff's debt at the time of these transfers, and the attempt of the defendant to defeat his collection of that debt or to participate in a distribution of his assets by passing title to all his property to the intervenors. That the intervenors were fully aware of the indebtedness of the defendant to the plaintiff at the time the defendant became indebted to them, and of his failing and insolvent condition at that time, is abundantly shown; and under this state of facts they may well be considered as having aided the defendant in his fraudulent designs to defeat the plaintiff's claim, first by taking a mortgage from defendant on his property and subsequently transfers of that property only a few days before the plaintiff's attachment was levied on the same property.

The decree of the lower court was correctly rendered.

Judgment affirmed.

Jacobs et al v. Levy et al.

No. 589.

BENJAMIN JACOBS et al. v. BENJAMIN LEVY et al.

For carrying on a private market in contravention of the ordinances of the city of Shreveport, the defendants may be responsible to said city on account thereof. But plaintiffs, who are lessees of the public markets, have no right to sue to enforce the ordinances of that political corporation, nor can the validity of said ordinances be tested in this controversy to which the city of Shreveport is not a party.

A PPEAL from the Tenth Judicial District Court, parish of Caddo, *Looney, J. Boorman & Elstner, Duncan & Moncure, Fuqua & Oakham*, for plaintiffs and appellees. *J. W. Jones, Wm. A. Seay, T. A. Flanagan*, for defendants and appellants.

WYLY, J. Plaintiffs, who are the lessees of the public markets in the city of Shreveport, and who under their contract with the city "have the exclusive right to collect all market dues within the present limits of Shreveport as per tariff now in force during the lease," have brought this suit against the defendants, who are keepers of a private market, for \$10,000 damages for keeping said market, and they sued out an injunction restraining them from pursuing said occupation.

No damages have been proved in this case, and the defendants have not refused to pay plaintiffs, when required, market dues as per tariff now in force. Since opening the private market, plaintiffs have not demanded of defendants market dues.

For carrying on a private market in contravention of the ordinances of the city of Shreveport, the defendants may be responsible to said city on account thereof. But plaintiffs have no right to sue to enforce the ordinances of this political corporation. Nor can the validity of the said ordinances be tested in this controversy to which the city of Shreveport is not a party. Nor can the validity of the contract between the city of Shreveport and the plaintiffs and the extent of the rights of the latter thereunder be determined in this suit; because the city of Shreveport is not a party and defendants are strangers to said contract. If the ordinances prohibiting private markets be valid, defendants have no interest in contesting with plaintiffs in regard to the extent of their rights, resulting from their contracts with the city of Shreveport.

If said ordinances on the other hand be held invalid, still defendants are in no manner concerned in regard to the contracts between plaintiffs and the city of Shreveport. Therefore the only inquiry in relation to defendants' right to keep a private market is, are the ordinances of the city prohibiting it valid or invalid; and this question, as before remarked, can not be determined in this suit, because the city of Shreveport, the party whose rights and authority under the charter are questioned, is not before the court.

Jacobs et al v. Levy et al.

It is therefore ordered that the judgment herein be set aside, and it is decreed that the demand of plaintiffs be rejected with costs of both courts.

Rehearing refused.

No. 574.

BENJAMIN LEVY & Co. v. CITY OF SHREVEPORT et al.

In order to present the question whether the mayor of the city of Shreveport had authority to arrest and fine the plaintiffs in this instance but defendants in certain cases in which they were sued for carrying on a private market in contravention of the ordinances of said city, and the question being whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They can not test the authority of the mayor to enforce the ordinances of the city prohibiting private markets, and the legality of said ordinances, in a proceeding of this kind, to wit, by injunction and a claim of damages.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. J. W. Jones, T. A. Flanagan, Wm. A. Seay*, for plaintiffs and appellees. *David M. Calliham*, city attorney, *J. W. Duncan*, for defendants and appellants.

WYLY, J. Plaintiffs allege that they are engaged in carrying on a private market, for which they have a license from the State; and they had applied for a city license and had been refused by the municipal authorities.

They further state that S. J. Ward, mayor of said city, on divers occasions in the month of February, 1875, wantonly, improperly and without authority in law, caused to be issued warrants, under which they were arrested and fined by the mayor twenty-five dollars in each case; that, in the prosecution of their said business, they were in the exercise of a legal right, and the mayor was without jurisdiction or authority in having them arrested and fined.

The petition further states, that they have taken a suspensive appeal to the Supreme Court of the State, from the judgments and fines imposed upon them; yet, notwithstanding this, the mayor continues to have them arrested daily, and has declared his intention to fine them for each and every day they pursue their business as aforesaid.

They conclude by asking for a judgment *in solido* against the city, and S. J. Ward, individually and in his capacity of mayor, for the sum of one thousand dollars damages.

On these allegations writs of injunction issued as prayed for.

Defendants excepted to the action on the ground that the petition discloses no good cause for the suit, and no proper showing is made for the issuance of the injunction. We think this exception should have been sustained. In order to present the question whether the

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mayor had authority to arrest and fine the defendants for carrying on a private market in contravention of the ordinances of the city of Shreveport, and the question whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They can not test the authority of the mayor to enforce the ordinances of the city of Shreveport prohibiting private markets, and the legality of said ordinances, in a proceeding of this kind.

And they can not seriously demand damages for alleged illegal acts that may or may not hereafter be done by the mayor.

It is therefore ordered that the judgment herein be set aside, and it is decreed that plaintiffs' suit be dismissed with costs of both courts.

Rehearing refused.

 No. 593.

JAMES W. HOWARD v. C. YALE, JR., & Co. WIMBUSH & HOWELL,
Intervenors.

Before the bond of the defendant and appellant was filed the plaintiff died. Subsequent to plaintiff's death the required bond was filed.

The motion of plaintiff's representative to dismiss the appeal upon the ground that he is not properly before the court, can not prevail. Plaintiff's death did not interfere with defendant's rights. As soon as the bond was filed, the jurisdiction of this court attached. If the plaintiff has died since the appeal was granted, the proper parties will have to be made here.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Calliham*, judge *ad hoc*, in lieu of district judge, recused. *Land & Taylor*, for plaintiffs and appellees. *O. W. Pegues*, for defendants and appellants.

MORGAN, J. Judgment was rendered against the defendants. From this judgment they moved, in open court, for an appeal, which was granted upon their furnishing bond as required by law.

Before the bond was filed, the plaintiff died. Subsequent to plaintiff's death the required bond was filed.

Plaintiff's representative now moves to dismiss the appeal upon the ground that he is not properly before the court.

We think he is. Defendants complied with the order of court by furnishing the bond required of them. They could not prevent the plaintiff from dying, nor did his death interfere with defendants' rights. As soon as the bond was filed the jurisdiction of this court attached. If the plaintiff has died since the appeal was granted the proper parties will have to be made here.

The motion to dismiss is denied, and the case is continued to make parties.

 Rayne v. Ditto—Lazarus Mayer, Warrantor.

No. 525.

R. W. RAYNE v. W. L. DITTO. LAZARUS MAYER, Warrantor.

The note sued upon was negotiable in form and was the maker's unconditional promise to pay the amount stated therein. When plaintiff received it from Mayer, indorsed "without recourse" on him, he took it at his own risk, and the indorser is not liable because of the defense of Confederate money consideration successfully pleaded by the defendant. The note was given in novation, indorsed "without recourse," and the indorser has not been notified of its dishonor by the maker. Even without this limitation in the indorsement, under the rules of commercial law, the indorser who has not been notified of non-payment at maturity can not be made liable.

APPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Taliaferro, J. Smith & Boatner*, for plaintiff and appellant. *J. T. Ellis*, for defendant and appellee.

WYLY, J. Plaintiff, holding an account and notes, aggregating \$748 63, against the commercial firm of Mayer & Levystein, accepted in novation thereof in 1867 the note of the defendant in favor of Lazarus Mayer for \$600, payable six months after date (which was August 13, 1866), said note being indorsed "without recourse" by the payee.

When the defendant pleaded in bar of the present action that the consideration of said note was Confederate money, the plaintiff called Lazarus Mayer in warranty and prayed judgment against him for \$748 63 in case it should be decided that the note in suit is invalid on account of its consideration. Mayer filed no answer to the call in warranty. The court finding the consideration of the note to be Confederate money rejected plaintiff's demand against the defendant and refused the call in warranty, reserving, however, plaintiff's rights against Lazarus Mayer as warrantor to be hereafter asserted. Plaintiff appeals, and in this court he contends that Lazarus Mayer, notwithstanding the indorsement "without recourse," is liable as warrantor of the validity of the note.

The note was negotiable in form, and was the maker's unconditional promise to pay the amount stated therein; when plaintiff received it from Mayer indorsed "without recourse" on him, we think he took it at his own risk and the indorser is not liable because of the defense of Confederate money consideration successfully pleaded by the defendant. The note was given in novation, indorsed "without recourse," and the indorser has not been notified of its dishonor by the maker. Even without this limitation in the indorsement, under the rules of commercial law, the indorser who has not been notified of non-payment at maturity can not be made liable. The authorities cited by appellant are not applicable.

Judgment affirmed.

Rehearing refused.

State of Louisiana ex rel Haven v. The City of Shreveport.

No. 572.

STATE OF LOUISIANA, ex rel. W. S. HAVEN, President, etc. v. THE
CITY OF SHREVEPORT.

The municipal corporations of this State are permitted to subscribe for stock of railway companies on certain conditions. In this instance, no ordinance whatever, in compliance with those conditions, was passed by the City Council of Shreveport, but, on motion, the proposition of a certain railroad company, to have a vote of the people taken for a subscription to the stock of the company to the amount of three hundred thousand dollars, was referred to the Mayor with authority to order an election. This could not be done. Therefore the acts of the Mayor in the matter were unauthorized and illegal, and could not impose any duty or obligation on the officers of the municipal corporation.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J. A. W. O. Hicks, for plaintiff and appellee. *D. M. Calliham, Wm. A. Seay*, and *A. Boorman*, for defendant and appellant.

LUDELING, C. J. This is a proceeding by mandamus, to compel certain officers of the corporation of Shreveport to perform a ministerial duty, to wit: The collection of contributions subscribed to a railroad company. Quite a number of questions have been discussed orally and by briefs, which, however, we do not consider involved in this case. The only question pertinent in this suit is, whether or not the acts asked to be done are ministerial duties of said officers?

The answer to their question will be found in the following narrative. On the tenth of March, 1874, the railroad company proposed to the City Council to have a vote of the people taken for or against subscription to the stock of the company, to the amount of \$300,000. On the same day the following ordinance was adopted by the council: "A petition from Great Western Railroad Company, asking for vote of the people for or against a subscription of \$300,000. Stock was, on motion, referred to the Mayor, with authority to order an election."

It is manifest the only action by the Council in this matter was to refer it to the Mayor. The Council did nothing more than to attempt to delegate its authority in the matter to the Mayor. This it could not do. The law declares that "It shall be lawful for the police juries and municipal corporations of this State to subscribe to the stock of corporations undertaking works of internal improvements, under the laws of the State, on complying with the provisions hereinafter set forth. All ordinances passed for such subscriptions shall contain the following provisions, to wit: a statement of the number and amount of shares proposed to be subscribed; second, the levy of a tax on the landed estate, situated in the parish or municipal corporation, sufficient to pay the amount of the subscription, and specifying the rate of taxation, and the time when it shall be payable." R. S. sec. 711 and 712.

These are the conditions upon which the municipal corporations are permitted to subscribe for stock of railway companies.

In this case no ordinance whatever was passed, but on motion the proposition of the railroad company was referred to the Mayor. *His* acts in the matter were unauthorized and illegal, and could not impose any duty or obligation on the officers of the municipal corporation.

It is therefore ordered that the judgment of the lower court be annulled, and that the demand of the relator be rejected, with costs in both courts.

Rehearing refused.

No. 535.

THOMAS S. WELLS v. ANNIE ALEXANDER & HUSBAND.

The sale from some of the heirs to a co-heir could not deprive the executor of his commissions.

It was a charge due by the whole estate, and where the whole of the estate passed by contract to one of the co-heirs, the whole of the charges were due to the extent of the estate by the co-heirs who purchased. There was no want of consideration for the note given by the defendant for the amount of commissions. The succession having merged in her she owed the debt.

The plea of *res judicata* is not well taken. It seems to rest upon the judgment homologating the executor's account. It is conclusive, it is true, as to the amount due, but it is no reason why the plaintiff should lose his judgment for said amount.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. James Bussey*, for plaintiff and appellee. *T. G. Parsons*, for defendant and appellant.

MORGAN, J. F. Wells died leaving a will of which the plaintiff was one of the creditors. The defendant was an heir for one-third of the succession. The succession was administered upon. The executors filed their account. It was homologated and made the judgment of the court. They were placed on the account for the amount of their commissions, \$910 30 each.

After the homologation of the account the defendant purchased from her co-heirs their interest in the succession which they had inherited. She then gave to plaintiff her note for the amount due him for his commissions. The note was not paid, and he seeks to recover the amount.

The defense is error and want of consideration. The commissions allowed the plaintiff was a charge against the estate. The sale of some of the heirs to a co-heir could not deprive the executor of his commissions. It was a charge due by the whole estate, and when the whole of the estate passed, by contract to one of the co-heirs, the whole of the charges were due to the extent of the estate by the co-

heir who purchased. Plaintiff had the right to claim immediate payment. Because he gave time it does not follow that he should not receive what the law and the court allowed him. There was no error on the part of the defendant when she gave the note, for she knew what she was doing. There was no want of consideration, for the succession having merged in her she owed the debt.

The plea of *res judicata* is not well taken. It seems to rest upon the judgment homologating the executor's account. It is, as claimed by defendant, conclusive as to the amount due. But this is a reason why it should be paid by the person who has become liable therefor; it is no reason why the plaintiff should lose his judgment.

We agree with the plaintiff that this appeal was prosecuted for delay.

It is therefore ordered that the judgment of the district court be affirmed, with ten per cent interest for a frivolous appeal.

No. 551.

J. BUNTIN et al. v. E. M. JOHNSON.

The motion to dismiss the appeal taken by plaintiffs can not prevail. To have filed in the parish court a petition similar to the one now under consideration after an appeal was granted from a judgment of the district court declaring that it had no jurisdiction, is not such an acquiescence in the judgment as will prevent an appeal.

The acquiescence which prohibits an appeal or destroys it when taken, is the acquiescence in a decree commanding something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in. Here nothing was ordered to be done. The judgment of the district court was simply that it had no jurisdiction. It did not order plaintiffs to institute proceedings in the parish court.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiffs and appellees. *Newton & Hall*, for defendant and appellant.

MORGAN, J. Petitioners aver that they are the legal heirs of Rebecca Johnson, deceased; that she left property to a considerable amount; that immediately after her death the defendant took possession of her estate, he claiming to be her universal legatee under a pretended will, of which he caused himself to be appointed executor. This will, they aver, is null and void. They pray to be decreed the owners of the property left by the decedent, and that the pretended will be set aside and annulled. The suit was instituted in the district court. The defendants excepted to the jurisdiction of that court. The exception was maintained. A motion is made to dismiss the appeal. The ground relied upon is, that after the appeal was granted they filed a petition, similar to the one now under consideration, in the

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parish court. This, they contend, is an acquiescence in the judgment. They claim that from a judgment acquiesced in no appeal will lie.

This is true. But the acquiescence which prohibits an appeal, or which destroys an appeal when taken, is the acquiescence in a decree which commands something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in. It is a confession that the judgment is correct, and one can not admit that a judgment is correct and then appeal from it. Here nothing was ordered to be done. The judgment of the district court was simply that it had no jurisdiction. It did not order them to institute proceedings in the parish court. The motion to dismiss is overruled.

ON THE MERITS.

The case is identical with and is controlled by the case of *Rachal, Tutor v. Rachal and Husband*, 1 R. 116, and the cases therein referred to.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed; that the exception to the jurisdiction of the district court be dismissed, and that the case be remanded to be proceeded in according to law, defendants to pay the costs of appeal.

No. 596.

DANIEL BUCKMASTER v. E. & B. JACOBS.

The parol testimony objected to was not inadmissible. The purpose of its introduction was not to contradict or vary the purport of a written instrument, but to establish an important allegation in the plaintiff's petition that, subsequent to entering into the written agreement, he had, at the special instance and request of defendants, supplied a considerable amount of labor and material appropriated to the erection of certain buildings in addition to that specified in the written act.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Nutt & Leonard*, for plaintiff and appellee. *Land & Taylor*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sues upon an account for labor done and material furnished in the construction of a house for the defendants on lot No. 6 in block No. 59 in the city of Shreveport. He claims a balance due him on his account of \$1196 61, with interest thereon from judicial demand, and a lien and privilege on the house to secure the payment of his account. He avers that a considerable portion of the labor done and material furnished by him was under contract with defendants who have the contract in their possession and refuse to

deliver it or a copy to him; that a considerable portion of labor and material supplied by him in the erection of the building was furnished outside of and over and above that stipulated in the contract.

The defendants deny owing the plaintiff any balance due for his labor and supply of material; that through error caused by him they have overpaid him \$772 93, and pray that they have judgment against him for that amount.

The plaintiff had judgment for \$716 71 with five per cent. interest thereon from the second of April, 1874, with recognition of the lien claimed. The defendants have appealed.

A bill of exceptions was taken to the admission of testimony to show—

First—The usual custom among brick masons in measuring brick walls to ascertain the number of bricks they contain.

Second—The usual and customary price per thousand for laying brick in walls above sixty feet high.

Third—The meaning among brick masons of the phrase “brick laid and actually counted.”

Fourth—That the plan of defendants' building was changed subsequently to the written contract between the parties; and that the wall was raised seven or eight feet higher than the original plan called for. The objections were that there was a written contract between the parties filed in evidence by plaintiff and parol evidence was inadmissible to extend, change, alter, contradict or vary the meaning of the written act; that the written act showed the price defendants agreed to pay for every thousand brick laid; that the number of bricks put in the building were to be ascertained by actual count and not by cubic or other measure or estimate; that neither can plaintiff prove by parol the meaning of the phrase “brick laid and actually counted,” the phrase not containing words of technical meaning or of ambiguous import.

We do not regard the testimony as inadmissible. The purpose of its introduction was not to contradict or vary the purport of the written instrument but to establish an important allegation in the plaintiff's petition, that subsequent to entering into the written agreement, he had at the special instance and request of defendants supplied a considerable amount of labor and material appropriated to the erection of the building, in addition to that specified in the written act. It was competent for him to establish by parol that, during the progress of the work, modifications in the plan were agreed upon by the parties; to show that the walls were raised higher than contemplated, and to show the customary charge for building these portions of walls that are raised above the height of sixty feet; no agreement having been

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entered into as to the costs of building walls above that elevation because the original agreement did not contemplate a greater height than sixty feet. The objection to showing the usual acceptance of the purport of the words "brick laid and actually counted" is without weight. In point of fact the actual counting of brick in a wall is impracticable after the wall is completed. Some method or rule of computation must be resorted to, and it is competent to show the rule or method of computation in general use.

This case depends for its solution exclusively on questions of fact, and after a careful review of the evidence we conclude that it preponderates in favor of the plaintiff, and that the judgment of the lower court was correctly rendered.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 000.

WILLIAM SANDEL v. D. B. DOUGLASS, Sheriff et als.

Plaintiff was the lessee of the plantation seized by these defendants as the property of one Mrs. Bell, the defendant in execution; and being the lessee, he was the owner of the seventy-seven bales of cotton raised by him on said plantation in 1869, which were seized and disposed of by defendants. That he was the lessee in 1868, can not be doubted. Whether the husband of Mrs. Bell had authority as agent to execute to him the lease for 1869, is immaterial, inasmuch as he remained on the place after the expiration of the lease of 1868, and continued to cultivate with his own means the plantation in 1869. The lease was continued by tacit consent.

That plaintiff signed the injunction bond as security for Mrs. Bell, when she resisted the execution of defendants' judgments, does not estop him from claiming to be the owner of the twenty-seven bales of cotton involved in this controversy. There the ownership of the cotton was not at issue, the right of defendants to execute their judgments against Mrs. Bell being then the subject of inquiry.

The mere seizure of the mortgage property in June, 1869, did not divest plaintiff of the title to the crop which he was raising on the plantation leased for 1869. That seizure in no manner disturbed him in cultivating the place. It was after plaintiff had shipped from the place sixty bales of cotton, and was about shipping the twenty-seven bales in dispute that defendants made the seizure and disposition of the cotton.

If the plantation had been sold by the sheriff pending the lease, under the mortgage previously executed, containing the *non alienando* clause, the sale would have dissolved the lease, and the purchaser could have taken possession. But it was not so. Under the circumstances of the case, the seizure of the cotton which belonged to plaintiff and the disposition of it was unjustifiable and wrong.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Robert J. Caldwell*, attorney at law, selected to try this case. Jury trial. *Newton & Hall*, for plaintiff and appellant. *Todd & Brigham*, for defendants and appellees.

WYLY, J. This case was before this court in 1873, and was remanded for the purpose of allowing the intervenor, Mrs. S. A. Bell, an

opportunity for serving citation, and putting her intervention at issue. The case is reported in 25 An. 566, to which reference is made for a statement of the case.

At the trial on the remandment, her intervention was dismissed and the demand of the intervenor, Cooper, was rejected. As neither of these intervenors have appealed, their pretensions will not be noticed, the controversy between the plaintiff and defendants being the only one to determine in this appeal.

We find from the evidence that plaintiff was the lessee of the plantation seized by defendants as the property of Mrs. S. A. Bell, the defendant in execution, and being lessee he was the owner of the twenty-seven bales raised on said plantation in 1869, which were seized and disposed of by defendants, and on account of which this litigation arises. That plaintiff was the lessee of the plantation in 1868 can not be doubted. Whether the husband of Mrs. Bell had authority as agent to execute to him the lease for 1869, is immaterial; he remained on the place after the expiration of the lease of 1868, and continued to cultivate the plantation in 1869. The lease was renewed by tacit consent. Revised Code 2688.

That plaintiff signed the injunction bond as security for Mrs. Bell when she resisted the execution of defendants' judgments, does not estop plaintiff from claiming to be the owner of the twenty-seven bales of cotton involved in this controversy. There the ownership of this cotton was not at issue, the right of defendants to execute their judgments against Mrs. Bell was the subject of inquiry.

Although the plantation was seized under the judgments of defendants in June, 1869, as the property of Mrs. Bell, it was not sold till 1873, long after the lease to plaintiff had expired. The mere seizure of the mortgage property in June 1869, did not divest plaintiff of the title to the crop which he was raising on said plantation leased for 1869. The seizure in no manner disturbed him in cultivating the place. Neither the sheriff nor his codefendants advanced any supplies, paid the laborers, nor did they in any manner contribute to the raising and gathering of the crop. It was after plaintiff had shipped from the place sixty bales of cotton, and was about to ship the twenty-seven bales in dispute that defendants made the seizure and disposition of this cotton.

If the plantation had been sold by the sheriff pending the lease under the mortgage previously executed containing the nonalienation clause, the sale would have dissolved the lease and the purchaser could have taken possession. But here, pending the seizure, the lessee is not disturbed in cultivating his crop, and after the cotton is ginned and baled ready for market—a movable belonging to the lessee—it is

seized by the defendants, taken from the possession of the owner, and shipped and disposed of by the defendants, Silbernagle & Co. We think the cotton belonged to plaintiff, and the seizure and disposition of it by the defendants was unjustifiable and wrong. *Richardson v. Dinkgrave, sheriff, et al.* 26 An. 632. The value of the property we fix, from the evidence, at \$2700. The damages, including attorney's fees, we fix at \$500.

It is therefore ordered that the judgment appealed from in favor of defendants be annulled, and it is decreed that plaintiff recover of defendants *in solido* thirty-two hundred dollars, with legal interest thereon from judicial demand, and costs of both courts.

Rehearing refused.

No. 563.

MARTHA J. SORRELS AND HUSBAND v. JAMES M. STAMPER.

After a mortgage has once perempted, it can not be reversed against a succession by the registry thereof after the lapse of ten years. No preference over ordinary creditors of a succession can be gained in that way.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *R. J. Caldwell*, judge *ad hoc*, in lieu of district judge *Ray*, recused. *Morrison & Farmer*, for plaintiff and appellant. *R. W. & R. Richardson*, for defendant and appellee.

MORGAN, J. In December, 1866, plaintiff brought this suit in the district court, parish of Ouachita, to foreclose *via ordinaria* a mortgage note for \$2355.

In May, 1869, it was transferred to the parish court and judgment was rendered on said note against the defendant, and the mortgage note was rendered executory.

Under this foreclosure of mortgage the land was sold and plaintiff bought it for \$1600, paying the costs and retaining the price in satisfaction of her execution. In the meantime suit had been brought in the parish court to annul the judgment, because the court which rendered it was without jurisdiction *ratione materiae*, and the judgment annulling it was rendered nine days after the said sale.

After considerable delay the plaintiff began to press her original suit in the district court to foreclose the mortgage, and the defendant, in bar of the action, pleaded the prescription of five years; also the peremption of the mortgage was pleaded. This was on eighteenth December, 1874. At the trial, on twenty-ninth March, 1875, the court rejected the plea of prescription as to the note, and gave plaintiff a personal judgment against the succession of the defendant, who had died,

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subsequent to the institution of this suit. The demand on the mortgage was rejected on the ground that it had not been reinscribed within ten years, and the reinscription thereof against the succession, which was made three years after the peremption, could not revive the mortgage against the succession of defendant.

The court also held that the proceedings, judgment and sale of the parish court had and obtained on this mortgage note for \$2355, were all absolute nullities, because that court was without jurisdiction *ratione materiae*, the matter in dispute exceeding \$500.

As the defendant only has appealed, the inquiry is limited to the correctness of the ruling of the learned judge who tried this case in regard to the mortgage set up by plaintiff. We think his conclusion that, after a mortgage has once perempted, it can not be revived against a succession by the registry thereof after the lapse of ten years, is entirely correct. No preference over ordinary creditors of a succession can be gained in that way. He also was right in holding that the judgment of the parish court and all proceedings thereunder in attempting to enforce this mortgage note for \$2355, were absolute nullities, that court being without jurisdiction *ratione materiae*.

The judgment appealed from is undoubtedly correct.

Judgment affirmed.

No. 590.

WALLACE & Co. v. CUMMING & MORRISON.

Creditors may become parties to an assignment in other ways than by actually signing the instrument, as by coming in under it for the purpose of obtaining a dividend. In this instance the plaintiffs were informed of the terms and conditions on which the defendants had assigned their property to their creditors, and they accepted their *pro rata* from the assignee without reservation, and thereby made themselves parties to the agreement. They ought not to be permitted to enjoy the benefit of a compromise, and at the same time repudiate all its obligations.

APPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. T. Alexander, A. & W. Voorhies, for plaintiffs and appellants. Nutt & Leonard, for defendants and appellees.

LUDELING, C. J. The plaintiffs sue on a note and an account. The defense is, that being in failing circumstances, the defendants called a meeting of their creditors, and with the assent of said creditors, assigned to them all the property and assets of said defendants, which were sold and collected and the proceeds thereof were distributed *pro rata* among the creditors, and that the agreement was that such assignment should fully release defendants from all their liabilities. The plaintiff, rely upon the fact that they did not sign the agreement.

This is true; but they were informed of its terms and conditions, and they accepted their pro rata from the assignee, without reservation, and thereby made themselves parties to the agreement. "Creditors may become parties to an assignment in other ways than by actually signing the instrument, as by coming in under it for the purpose of obtaining a dividend." "By becoming a party to an assignment a creditor entitles himself to the full benefit of the provision made by it in his behalf, while on the other hand he frequently surrenders rights, on which he might otherwise insist." Burwell on Assignments 217; 7 How. 276.

The plaintiffs ought not to be permitted to enjoy the benefit of a compromise and at the same time repudiate its obligations.

It is ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 566.

JOHN DAVIS v. WILLIAM C. MADDEN.

The objection that the special commissioner named in the commission did not execute it, because he annexed to his signature "commissioner for the State of Louisiana," and did not affix the seal of his office, is frivolous. The person named as special commissioner executed the commission, and the addition of his title, if he be a commissioner for the State, did not vitiate his acts.

The judge *a quo* erred in refusing to receive evidence on the reconventional demand set up in the amended answer of defendant. That demand was sufficiently set forth. If the plaintiff had needed the particulars he mentions to enable him to make his defense against defendant's demand in reconvention, he should have required defendant to state with more accuracy his demand. As it is, the plaintiff appears to have been sufficiently notified of the demand against him for all practical purposes.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. R. W. Richardson*, for plaintiff and appellee. *Newton & Hall*, for defendant and appellant.

LUDELING, C. J: This is a suit for a promissory note for \$7012.

The defense is that the note was given without any consideration, and the defendant pleads in reconvention an account for \$14,300 75.

On the trial evidence was introduced to show that the note was made by defendant to enable the plaintiff to raise money on it by discounting it in bank, in order that the plaintiff might buy horses, mules and cattle, to be sold by defendant in Louisiana for the joint profit of both, and that as between them there was no consideration for the note. To this effect the defendant swears, and he is to some extent corroborated by his brother and one other witness, who testify as to what plaintiff told them about a due note put in bank by him. On the contrary, the plaintiff swears that the note was given for a

Davis v. Madden.

debt due by defendant after a settlement of their affairs up to that date. He is corroborated by the note itself. It reads as follows:

"LEXINGTON, KY., April 17, 1871.

"\$7012.

"One day after date I promise to pay to John Davis seventy hundred and twelve dollars, for value received of him.

"WM. C. MADDEN."

It is evident that such a note, not negotiable in form and due one day after date, was not intended to be used in bank. Nor does it appear to have been so used—but that it has remained in the possession of plaintiff, who at different times indorsed credits on the note, which he swears were placed there in the presence of the defendant. There are other circumstances which make us adopt the conclusion of the district judge, that the want of consideration was not proved.

The objection that the special commissioner named in the commission did not execute it, because he annexed to his signature "Commissioner for the State of Louisiana," and did not affix the seal of his office, is frivolous. The person named as special commissioner executed the commission, and the addition of his title, if he be a commissioner for the State, could not vitiate his acts.

The plaintiff objected to the reception of any evidence on the reconventional demand. In the original answer the reconventional demand is based upon an itemized account, which it is alleged is made a part of the answer, but which, in fact, was not attached to the answer, nor filed, until the trial, when it was objected to. In the meantime an amended answer had been filed to which was annexed an account. This was objected to as too vague and indefinite to enable the plaintiff to meet the issues presented. The account annexed to the amended answer is as follows:

"John Davis

To W. C. Madden, Dr.

"1870.

"To amount remitted to Lexington City National Bank....\$1,323 73

"To Check on New York \$979 08

"1871.

"To cash 353 26

"To check on New York, yr. favor..... 1,620 00

"To cash handed you..... 900 00

"\$5,176 59"

The plaintiff urges that of the two dates given, 1870 and 1871, one was before and the other may have been before the date of the note; and that the month is not given to any of the items, nor the name of the drawer of the check, nor the name of the bank on which it was

drawn. These objections were sustained by the judge *a quo*, and defendant excepted. We think the judge erred in refusing to receive evidence on the reconventional demand set up in the amended answer. The evidence shows that the plaintiff and defendant were doing business together in 1870 and 1871; the plaintiff bought stock in Kentucky, shipped them to Louisiana to defendant, who was to sell them, and after deducting their costs, the net profits were to be divided between them. From the nature of the business it is not to be expected that regular books were kept of their accounts, or that the remittances of the character mentioned in the amended answer were so numerous, as to make it necessary that a more particular description of them should have been made, in order to give plaintiff notice of the demand in reconvention. We think it quite certain that if the remittances were made as alleged, the plaintiff was as fully informed, by the account annexed, as if the day and month had been stated, and the names of the drawers of the checks had been given. Besides, if the plaintiff had needed those particulars to enable him to make his defense against said demand, he should have required the defendant to state with more accuracy his demand in reconvention. Pleadings, it is true, as alleged by plaintiff's counsel, are intended to give notice of the demands to litigants. We think the plaintiff was sufficiently notified of the demand against him for all practical purposes; and we believe that the ends of justice will be subserved by remanding this case to the court *a qua* to try the reconventional demand.

It is therefore ordered that the judgment of the lower court be annulled, and that the case be remanded to be tried according to the views herein expressed, appellee to pay costs of this appeal.

No. 577.

JULIA WILLIAMS AND HUSBAND v. J. W. FULLER.

This is a suit in injunction prohibiting defendant from suing plaintiff, or foreclosing his mortgage as vendor, and praying for the rescission of the sale of a tract of land, on the ground of defective title.

The plaintiff has failed to set forth a cause of action in her petition. It has been settled that the surviving husband, the head of the community, may sell community property after the death of his wife. The title of the property, in this instance, stands in the defendant's name on the records of the parish where the property is situated, and *he is personally bound for the debts of the community*. Besides, plaintiff is not disturbed in her possession, or threatened with eviction.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. Fugua & Calliham, for plaintiff and appellant. A. W. O. Hicks, for defendant and appellee.

LUDELING, C. J. The defendant sold by public act to plaintiff a

tract of land, and retains a vendor's privilege and a mortgage to secure the credit portion of the price. Before the maturity of the last note, the plaintiff enjoined the defendant from suing her or foreclosing his mortgage, and in the same suit prayed for the rescission of the sale, on the grounds substantially that the property belonged to the community of R. T. Buckner and his wife, and that after the death of Buckner's wife, he could not sell the property, as he had a child, a minor, who owned an undivided half of the community property. The defendant moved to dissolve the injunction on the face of the papers, and afterward alleged in his answer that the suit was premature; that she had not tendered him a title of the property, and that she was in the undisturbed possession of the property, etc.

There was judgment in favor of the defendant and plaintiff appealed.

The plaintiff fails to set forth a cause of action in her petition. It has been decided by this court that the surviving husband, the head of the community, may sell community property, after the death of his wife. The title of the property stands in *his* name on the records of the parish where the property is situated, and *he* is *personally* bound for the debts of the community. Besides, she is not disturbed in her possession or threatened with eviction. 26 An. 219; 17 La. 27; 2 An. 460; C. C. 2560.

It is therefore ordered that the judgment appealed from be affirmed, with costs of appeal. It is further ordered that the defendant's rights to sue for damages for wrongfully suing out the injunction be reserved.

No. 597.

J. W. FULLER v. A. H. LEONARD.

The defendant was bound as acceptor. No notice of protest was necessary to fix his liability either as surety or acceptor. A loan of money was made by plaintiff to Sturgess, and the draft of Sturgess for that amount was drawn upon and accepted by Leonard to enable Sturgess to get the money he wanted from plaintiff, who, to the defendant's knowledge, would not have loaned the money without security, and who rested upon the defendant's acceptance as securing the amount loaned to Sturgess. Under no aspect of the case can there be any weight in the defense.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Duncan*, Special Judge. *Egan & Wise*, for plaintiff and appellee. *Nutt & Leonard*, for defendant and appellant.

TALIAFERRO, J. The defendant is sued on a draft accepted by him, drawn by E. M. Sturgess to his own order for the sum of \$1250, payable thirty days after date. The defendant excepted to plaintiff's action on the ground that he is not the owner of the instrument sued

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upon, no indorsement appearing upon the draft passing the legal title, which exception, being overruled, the defendant answered that he signed the draft as accommodation acceptor; that to the knowledge of plaintiff Sturgess never had any funds in the hands of defendant, and that he was never indebted to him in any amount. He further pleads that if he had at any time been liable on his acceptance he was released by the plaintiff's laches in granting indulgence and time to Sturgess, the principal debtor, and failing to have the draft protested at maturity, and to give notice to the defendant; and also by failing to make demand on Sturgess, the principal debtor. Judgment was rendered in favor of the plaintiff for the amount claimed, and the defendant appealed.

The defense is without much weight. The defendant, as acceptor, was primarily bound; no notice of protest was necessary to fix his liability either as surety or acceptor. The testimony shows that a loan of money was made by Fuller to Sturgess, and that this draft was drawn upon and accepted by Leonard to enable Sturgess to get the money he wanted from Fuller, who, to the defendant's knowledge, would not have loaned the money without security, and that he rested upon the defendant's acceptance as securing the amount loaned to Sturgess. Under no aspect of the case could the defense be availing.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

Rehearing refused.

No. 573.

CITY OF SHREVEPORT v. MARY M. MAPLES AND HUSBAND—CITY OF
SHREVEPORT v. F. P. STUBBS—Consolidated.

The contract for macadamizing Commerce street in the city of Shreveport was awarded to the undertaker on the third of May, 1871, and the assessment to pay for the work was ordered on the eighth of that month. These acts were done under the authority conferred by the act of the Legislature of March 9, 1869.

But the law establishing the new charter of the city of Shreveport was approved by the Governor on the twenty-seventh of April, 1871, and went into effect from and after its passage. The council deriving its powers from the act of 1869, in virtue of the constitutional provision on that subject recognized by the 21st section of the new charter, held over and remained in office until the organization of the new council to be appointed under the new charter; but it, was from and after the passage of the act of twenty-seventh April, shorn of the powers it previously possessed under the law of 1869. From and after the passage of the act of twenty-seventh April, 1871, it could only exercise the powers granted under that act, and these did not authorize the contract and assessment made in May, 1871.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Pegues, judge *ad hoc*, in lieu of *Looney*, district judge, recused.

City of Shreveport v. Maples and Husband—City of Shreveport v. Stubbs—Consolidated.

D. M. Calliham, city attorney, for plaintiff and appellant. *N. C. Blanchard, Wm. A. Seay*, for defendants and appellees.

TALIAFERRO, J. Each of the defendants is sued for a pro rata amount of tax claimed by the plaintiff to be owing by them under the provisions of an ordinance of the city of Shreveport providing for the grading and macadamizing of Commerce street. A tax for this purpose was levied sometime in the year 1871, under an act of the Legislature, approved March, 1869, providing for the improvement of the streets, etc., of said city. The plaintiff alleges that the work has been done under contracts properly entered into, and claims a lien and special privilege on the lots of the defendants in front of which these improvements have been made, as security for the payment of the defendants' shares of the tax imposed for the purposes aforesaid.

The defense is, that at the time this special tax was levied and the contract awarded, the present charter of the city of Shreveport (that of 1871) had become operative; and further, that the charter of 1871 abrogated act No. 109 of the Legislature, approved March 9, 1869, under which the city was authorized to levy the tax, a pro rata of which is claimed from the defendants.

There was judgment in the court below in favor of the defendants and the plaintiff has appealed.

The controversy is to be decided by determining the state of facts that exist as to the date at which the act establishing the charter of 1871 went into operation. The charter of 1871 was approved by the Governor on the twenty-seventh April, 1871. The act went into effect as defendants contend, from and after its passage, and that it repealed all laws or parts of laws in conflict with it. The act contains that provision; but the last clause of the 21st section of the act, the plaintiff contends, controls that provision as to the time of its taking effect. That clause provides that "upon the organization of the council of the city of Shreveport as provided for in this act all the rights, powers, privileges and immunities possessed and enjoyed by the mayor and city of Shreveport, as at present constituted, should cease and terminate and be vested in the city of Shreveport as established by this act." We find from the record that the council appointed under the new charter met first for the purpose of organization on the twenty-seventh of May, 1871. No authority was exercised by that council under the new charter prior to that time. Some delay seems to have occurred after the passage of the act creating the new municipal government in the matter of appointing the officers by the Governor. It is shown that the contract for macadamizing Commerce street was awarded to the undertakers on the third of May, 1871, and that the assessment to

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pay for the work was ordered on the eighth of that month. These acts were done under the authority conferred by the act of the Legislature of March 9, 1869. The power to impose special taxes upon front proprietors for the improvement of streets lying in front of their property, the defendants do not deny to have existed under the act just referred to.

The defendants contend that the charter of 1871 forbids the council from enforcing the collection of special taxes on front proprietors for the purpose of defraying the expense of improving streets in front of their property; that there is an inconsistency in this respect between the provisions of the two acts, and therefore that the act of 1869 is repealed; while on the other hand it is held that the mode prescribed by the new act (that of 1871, section 17), for improving and paving the streets and the method of providing for the payment for such work is not exclusive, and does not prohibit the municipal authorities from adopting any other mode recognized and permitted by existing laws, leaving the matter within the discretion of the council to adopt the mode pursued by council acting under the law of 1869, or not, as in its judgment the public interests may require, and that nothing forbids it from exercising the general power conferred by the 10th section of the new charter or that specially given by the act of 1869.

We are inclined to adopt the views of this subject presented on the part of the defendants, and conclude that at the time the contract was entered into by the council then acting (May 3, 1871) for work on Commerce street, and the assessment made on the eighth of that month to pay for it, the power or authority theretofore existing under the act of 1869, to sanction such action of the council was abrogated and did not exist; because the act establishing the new charter was approved by the Governor as we have seen on the twenty-seventh of April, 1871, and went into effect from and after its passage. The council deriving its powers from the act of 1869, in virtue of the constitutional provision on that subject, recognized by the 21st section of the new charter, held over and remained in office until the organization of the new council to be appointed under the new charter; but it was from and after the passage of the act of twenty-seventh April shorn of the powers it previously possessed under the law of 1869. From and after the passage of the act of twenty-seventh April, 1871, it could only exercise the powers granted under that act, and these do not authorize the contract and assessment made in May, 1871.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

No. 591.

J. J. L. GOODMAN v. J. J. RAYBURN, Executor.

This is a suit against an estate on an account made out against Joseph Howell, a deceased person. The plaintiff, by his own testimony and by that of another, offered to prove Howell's acknowledgment that he owed the debt and that he promised to pay it. This testimony was objected to by defendant, on the ground that such acknowledgment could only be established by written evidence. The judge *a quo* erred in receiving such testimony; neither was it competent for plaintiff to prove by parol the credits or payments alleged to have been made on the indebtedness.

The allegations that certain items of the account sued on were property belonging to plaintiff and sold by Howell, who retained the proceeds without accounting for them, were attempted to be sustained not by any written evidence, but by the parol evidence of the plaintiff and of an absent party who, by the admission of defendant's counsel, would swear, if present, that Howell acknowledged the correctness of the account. This testimony should have been excluded.

Where an account is not shown to be a stated account, and is to be regarded as an open one, it is prescribed by three years.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Nutt & Leonard*, for plaintiff and appellee. *N. C. Blanchard*, for defendant and appellant.

TALIAFERRO, J. Suit is brought in this case upon an open account, showing a balance due of \$2113 96, for which judgment is prayed with legal interest. The answer is a general denial and plea of prescription of one, two and three years. The plaintiff had judgment in his favor and defendant appealed.

This is a suit against an estate; the account is made out against the estate of Joseph Howell, a deceased person. The plaintiff, by his own testimony and that of another, offered to prove Howell's acknowledgment that he owed the debt, and that he promised to pay it. This testimony was objected to by the defendant on the ground that such acknowledgment could only be established by written evidence, but the parol proof being received the defendant reserved a bill of exceptions. We think the testimony should have been rejected. Acts of 1858, 158; C. C. 2278; 26 An. 514; 25 An. 492; 24 An. 496. Neither was it competent for plaintiff to prove by parol the credits or payments alleged to have been made on the indebtedness claimed. 21 An. 350; 23 An. 531, 549.

Two items of the account, one under date of September 5, the other of November 8, in the year 1865, make the aggregate sum of \$1415; the plaintiff insists that to this extent, the account sued on is not prescribed, because those items were for property belonging to plaintiff and sold by Howell, who retained the proceeds without accounting for them. This allegation was sustained not by any written evidence, but by the parol evidence of the plaintiff and of an absent party who, by the admission of defendant's counsel, would swear, if present, that Howell acknowledged the correctness of the account. The items aggregating the sum of \$1415 as aforesaid, figure as constituting, with

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the other items, one account. This account is not shown to be a stated account, and we regard it as an open account and prescribed by three years.

The bill of exceptions was well taken. The testimony objected to should have been excluded.

It is therefore ordered that the judgment appealed from be annulled and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff paying costs in both courts.

Rehearing refused.

No. 602.

CHARLES McNABB v. MARTIN TALLY AND DUNCAN.

A bill was drawn by A. Flournoy to his own order upon Thurmond and Hicks and Martin Tally, and by them accepted for \$1125, which bill was indorsed by Duncan. Thurmond and Hicks, joint acceptors with Tally, paid on the second February, 1871, one-half of the amount of the bill, principal and interest then due, and were released from further liability by the plaintiff, holder of the bill. He now claims from defendants, *in solido*, Martin Tally, as acceptor, and Duncan as indorser, the remainder due.

The defense, on the part of Tally, that plaintiff should have exhausted his legal remedies against the drawer and the acceptors Thurmond and Hicks, is not tenable under the rules of the law merchant. Tally and Thurmond are jointly bound as between themselves, but each is bound to the holder for the full amount. As to the indorser, Duncan, he is released by failure to serve legal notice upon him of the protest of the bill.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. Egan, Williamson, Wm. H. Wise, for plaintiff and appellant. D. H. Calliham, Duncan and Moncure, for defendants and appellees.

TALIAFERRO, J. This suit is brought against Martin Tally as the acceptor and James W. Duncan as the indorser of a bill drawn by A. Flournoy, Jr., to his own order upon Thurmond and Hicks and Martin Tally, and by them accepted for \$1125. The plaintiff alleges that Thurmond and Hicks, joint acceptors with Tally, paid on the second February, 1871, one-half the amount of the bill, principal and interest then due, and that he released them from further liability. He claims from the defendants *in solido* the remainder due.

The defendant, Tally, denies any indebtedness to the plaintiff; avers that he accepted the bill for the accommodation of the drawer, a fact well known to him, and that his acceptance and indorsement were subsequent to that of Thurmond and Hicks. He alleges that he was but the security of Flournoy and Thurmond and Hicks, and can not be held liable until the plaintiff shall have exhausted his legal remedies against the plaintiff and the acceptors Thurmond and Hicks.

The other defendant, Duncan, answered, denying indebtedness to the plaintiff.

McNabb v. Tally and Duncan.

Judgment was rendered in favor of the defendants and against the plaintiff, and he appeals.

The case must be determined by the rules of the law merchant. Under these it is clear the defense is without force. Tally and Thurmond are jointly bound as between themselves, but each bound to the holder of the bill for the full amount. Duncan, the indorser, was released by failure to serve legal notice upon him of the protest of the bill.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be annulled and reversed. It is further ordered that the plaintiff recover from the defendant, Martin Tally, five hundred and sixty-two dollars and fifty cents, with eight per cent. interest thereon, from the twentieth of December, 1870, until paid, with all costs of suit.

Rehearing refused.

No. 603.

A. B. LEVISEE v. SHREVEPORT CITY RAILROAD COMPANY.

When plaintiff undertook to perform for the company a service not strictly within the sphere of his duties as President thereof, he should have required a stipulation for remuneration for said service, if he expected it from the company. He was the president, acting within the scope of his authority in directing the construction of certain works. He had no right, however, to employ himself as a master builder and expect a good salary.

In regard to the expenses for constructing a depot, there was a full settlement between plaintiff and defendant, and if plaintiff's account now presented is valid, it should have been embraced in that settlement, there being no allegation of error.

APPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. J. B. Slattery, Wm. A. Seay, for plaintiff and appellant. Egan & Wise, for defendant and appellee.

WYLY, J. Plaintiff appeals from the judgment rejecting his demand, \$750 for five months services rendered by him in superintending the construction of a railroad depot for the Shreveport City Railroad Company, and also an account of \$20 for tools and materials furnished for the work. The plaintiff was the president of the company, and the corporation promised no remuneration for his services in directing the construction of a depot.

He was in no sense a *negotiorum gestor*, and there was no implied contract between him and the company. He was the president acting within the scope of his authority in directing the construction of the work. He had no right, however, to employ himself as a master builder, and expect a good salary. He could not put his duty as president in conflict with his private interest, in getting a good situation

as builder at a good salary. From the evidence, we are satisfied that when the company authorized him to direct the construction of the work no salary as master builder was expected to be paid. When plaintiff undertook to perform for the company a service not strictly within the sphere of his duties as president, he should have required a stipulation for remuneration for said service if he expected it from the company.

In regard to the expenses for constructing the depot there was a full settlement between plaintiff and defendants, and if the account of \$20 is valid, it should have been embraced in that settlement, there being no allegation of error in said settlement.

Judgment affirmed.

No. 530.

W. L. SPEARS, Liquidator v. MRS. J. SPEARS, Administratrix.

As the plaintiff, W. L. Spears, resided in the parish of Claiborne, and could only have been sued there on claims against the firm of Spears & Ramsey, which he assumed to pay at the dissolution of said firm, the defendant had the right to set up the reconventional demand, which is objected to.

Whether the plaintiff owns certain claims and the notes attached to his petition, as an individual or as a liquidator, is a matter into which defendant has no interest to inquire. The same is applicable to the claim of Ramsey, who was a member of the partnership and who authorized plaintiff to settle and liquidate its affairs. Defendant has no interest in asserting the rights of Ramsey. It is sufficient if payment to plaintiff will protect defendant from a subsequent demand for the same debt by Ramsey, and of this there can be no doubt.

A PPEAL from the Eleventh Judicial District Court, parish of Union. *Trimble, J. J. C. Egan*, for plaintiff and appellant. *G. H. Ellis* and *Cobb and Gunby*, for defendant and appellee.

WYLY, J. Plaintiff sues the defendant on an account for \$2096 82. Defendant specifically denied items of this account, amounting in the aggregate to \$1306 15, and pleaded in compensation and reconvention an account of \$1854 35, praying judgment in her favor for \$1064 18. The court gave judgment for plaintiff for thirteen dollars and eighty-six cents, and he has appealed.

As the plaintiff resided in the parish of Claiborne, and could only have been sued there on claims against the firm of Spears & Ramsey, which he assumed to pay at the dissolution of said firm, the defendant had the right to set up the reconventional demand.

After examining the evidence, we find that plaintiff has established his demand to the amount of \$1910 90, and from the proof we fix the reconventional demand at \$1086 26, exclusive of the claim for rent of the dwelling house, defendant's right to which being preserved for a separate action.

Spears, Liquidator v. Mrs. J. Spears, Administratrix.

The items aggregating \$542 68 are not properly the debts of third persons; they are for claims belonging to plaintiff, which the deceased, J. P. Spears, collected and appropriated. Whether the plaintiff owns the claim for \$400 and the notes attached to the petition, as an individual or as liquidator, is a matter into which defendant has no interest to inquire. And the same remark is applicable to the item of \$118, which defendant says is the property of Ramsey, who was a member of the partnership, and who authorized plaintiff to settle and liquidate its affairs. Ramsey gave the suit to the clerk to be filed, and was present at the trial. Defendant has no interest in asserting the rights of Ramsey. It is sufficient if payment to plaintiff will protect defendant from a subsequent demand for the same debt by Ramsey, and of this there can be no doubt.

The item of \$54 for repairs set up by plaintiff has not been satisfactorily established against the defendant.

It is therefore ordered that the judgment herein be set aside, and it is decreed that plaintiff recover of the defendant eight hundred and twenty-four dollars and sixty-four cents, with legal interest thereon from judicial demand and all costs.

Rehearing refused.

No. 588.

SARAH L. LAY et als. v. SUCCESSION OF ELIAS O'NEAL.

The plaintiffs, as heirs of Isaac Lay, sue the succession of O'Neal for a large sum to be paid in the course of administration and allege in substance that O'Neal was their tutor for many years. The defendants have excepted to the mode of action and to the jurisdiction of the court. The judge *a quo* erred in overruling the exception.

The plaintiffs should have called upon the executrix of the deceased, O'Neal, to file an account of his tutorship, and by opposition to the account, should have raised the issues involving its correctness, and then have the various matters in contestation duly proceeded with and determined in their regular order, and the tutor's liability, if any, definitely fixed by final judgment of the parish court.

Instead of this proceeding, the plaintiffs bring suit in that court against the succession of O'Neal for an arbitrary amount, which they fix themselves as the indebtedness of the tutor, and pray judgment against the succession for that sum, an amount far above the jurisdiction of that court in a direct action for a specific sum of money. This is illegal, and can not be maintained.

A PPEAL from the Parish Court, parish of Bossier. *Baker, J. J. D. Watkins*, for plaintiffs and appellees. *J. A. Snider*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs, as heirs of Isaac Lay, sue the succession of O'Neal for \$104,847 93, to be paid in due course of administration. They allege in substance that Elias O'Neal was their tutor for many years, and filed before his death eight annual accounts of

his administration. The defendant excepted to the form of action instituted by plaintiffs, because the eight annual accounts filed by the tutor had been duly homologated by a court of competent jurisdiction, and the judgments of homologation could not be treated as absolute nullities, but must be avoided by direct action. Defendant further excepted that the parish court had no jurisdiction of the money demand brought by the plaintiffs as it so largely exceeds the sum of five hundred dollars.

The exception was overruled and the court proceeded with the case. The several annual accounts homologated as aforesaid were disposed of as follows: The first was confirmed; the second, third and fourth were rejected and annulled; the fifth was amended by greatly reducing the credits claimed by the tutor; the sixth was in like manner amended; the seventh and eighth were annulled and amended so as to conform to the amounts previously fixed in the judgment of the court now rendered.

Thirteen thousand thirty-four dollars and ninety-two cents was the sum fixed as the distributive share of four heirs, subject to certain credits.

Judgment was rendered accordingly and defendants have appealed.

We think the exception should have been sustained. Instead of following the plain provisions of article 998 of the Code of Practice, and calling upon the executrix of the deceased tutor to file an account of the tutorship of O'Neal, and by opposition to the account raised issues involving its correctness, and then having the various matters in contestation in their regular order duly and regularly proceeded with and determined, and the tutor's liability, if any, definitely fixed by final judgment of the parish court, the plaintiffs bring suit in that court against the succession of O'Neal for an arbitrary amount which they fix themselves as the indebtedness of the tutor, and pray judgment against the succession for that sum, an amount far above the jurisdiction of that court in a direct action for a specific sum of money. We regard the proceeding in this case as irregular and not in conformity with law, and conclude that it can not be maintained.

It is therefore ordered that the judgment of the parish court be annulled and reversed. It is further ordered that this case be dismissed at plaintiffs' costs, without prejudice to their right to institute new proceedings on their demand.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

NOVEMBER, 1875.

JUDGES OF THE COURT :

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	} <i>Associate Justices.</i>
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. P. H. MORGAN.	

No. 4476.

MOORE, JANNY & HYAMS v. LOUIS LALAUURIE.

The sureties on a suspensive appeal bond can be made liable where execution issued on certificate of the non-filing of the transcript by the appellant and the money could not be made after taking necessary steps against the principal.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Labatt & Aroni*, for plaintiffs and appellants. *Charvet & Duplantier*, for defendant and appellee.

WYLY, J. In this case the question is whether the sureties on a suspensive appeal bond can be made liable where execution issued on certificate of non-filing of the transcript by the appellant, and the money could not be made after taking necessary steps against the principal.

The counsel for plaintiffs suggest that it is a new question. We find, however, the precise question was decided by this court in the affirmative in the case of *Champonier v. Washington*, 2 An. 1013.

It is therefore ordered that the judgment herein be annulled, and it is decreed that the rule herein against the sureties on the appeal bond of the defendant be made absolute as prayed for, with costs.

No. 5801.

THE CITY OF NEW ORLEANS v. PEOPLE'S BANK.

The only question in this case is, whether municipal taxes for 1873 on the capital stock of the People's Bank can be imposed. It must be answered in the affirmative. In 1869, when the defendant, the People's Bank, was incorporated under the act of the fifteenth of March, 1855, entitled an act to establish a general system of free banking in this State, the statute of 1857 exempting free banks from municipal taxation had been stricken with nullity by article 118 of the constitution of 1868. Such exemption formed, therefore, no part of the contract arising from the act of incorporation.

Defendant contends erroneously that there is no statute authorizing the municipal taxation of a banking institution, and that the ordinance passed by the city without the sanction of such law is absolutely void.

The capital of a bank is its property and is liable to taxation unless specially exempt.

By section 12 of the charter of 1870, the city of New Orleans is authorized and required to "*levy an equal and uniform tax, for the purposes of this act, on all property, real and personal, in said city.*" * * *

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, assistant city attorney, for plaintiff and appellee, *Braughn, Buck & Dinkelspiel*, for defendant and appellant.

WYLY, J. Defendant appeals from the judgment in favor of the city of New Orleans for \$6875 for municipal taxes on its capital stock for 1873.

In this court the sole question is, can the taxes in question be imposed on the defendant, a bank incorporated in December, 1869, under the act of fifteenth March, 1855, entitled "an act to establish a general system of free banking in the State of Louisiana," in view of the act of 1857, which provides "that from and after the passage of this act all capital employed in free banking in this State shall be exempt from municipal taxation."

The precise question was presented in the case of the same plaintiff against the Bank of Lafayette, and in May, 1875, this court decided that the exemption mentioned in the act of 1857 was repugnant to article 118 of the constitution of 1868, and was stricken with nullity thereby, except in regard to free banks incorporated prior to the adoption of said constitutional provision, and that the bank of Lafayette was incorporated subsequently. In 1869, when the defendant, the People's Bank, was incorporated, the statute of 1857 exempting free banks from municipal taxation had been stricken with nullity by the constitutional provision referred to; it therefore formed no part of the contract arising from the act of incorporation. Defendant, however, contends there is no State law authorizing the municipal taxation of a banking institution, and that the ordinances passed by the city without the sanction of such law are absolutely void.

The capital of a bank is its property, and is liable to taxation, unless specially exempted.

By section 12 of the charter of 1870 the city of New Orleans is

authorized and required "*to levy an equal and uniform tax for the purposes of this act, on all property, real and personal, in said city.*" * * *

The question of a commutation tax, argued by the learned counsel for defendant, is not in this case.

The State never contracted with defendant on the subject of commuting taxes.

Judgment affirmed.

Rehearing refused.

No. 5429.

MECHANICS' AND TRADERS' BANK v. JESSE R. POWELL. JAMES E. ZUNTS and SAMUEL R. BERTRON, third opponents.

Powell effected a four months' loan with the New Orleans Banking Association, and gave as collateral security four notes, with mortgage on his property. On the maturity of the four months' loan, Powell, not having money to pay said loan, applied to Low & Ludwigson for a loan to pay the bank, which was furnished on condition that the twelve months' notes pledged to the New Orleans Banking Association should be delivered to them as collaterals. Powell's debt to the bank was paid with the money thus borrowed and the collaterals were delivered by the bank to Ludwigson, who pledged them to the Mechanics' and Traders' Bank, plaintiff in this suit, for a debt of Low & Ludwigson.

After the transaction aforesaid the mortgage rights of the third opponents arose. This court thinks that the third opponents erroneously contend that the payment by Powell of the four months' loan extinguished the mortgage given to secure the twelve months' notes, now in suit. Practically, the original debt to one creditor was extinguished by the substitution of another creditor, upon the express condition that the security should be continued as it then existed. It was clearly not the purpose or intention of Powell to extinguish the mortgage, and the manner in which the evidence thereof was delivered to the new creditor did not have that effect.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Hornor & Benedict, Randolph, Singleton & Browne*, for plaintiff and appellee. *Robert H. Marr*, for James E. Zunts, third opponent and appellant. *James Ligan*, for Samuel R. Bertron, third opponent and appellant.

HOWELL, J. The plaintiff, as holder and owner of several mortgage notes, made by the defendant, sold the property under a writ of seizure and sale, and the third opponents claimed the proceeds by preference to satisfy judicial mortgages held by them.

The material facts are as follows: In November, 1869, defendant, Powell, effected a four months' loan for \$20,000 with the New Orleans Banking Association, and gave as collateral security four notes at twelve months' from that time, secured by mortgage on property of Powell. At the maturity of the loan at four months, Powell, not having the money to pay, applied, through an agent, to Low & Ludwigson for a loan to pay the bank, which was furnished upon condition that the mortgage notes then pledged to the bank be delivered to them

as collaterals. The agent of Powell, with the money obtained from Low & Ludwigson, paid the four months' loan and demanded the collaterals for the purpose of delivering them, as promised, to Low & Ludwigson; but the president of the Banking Association, being of opinion that if said notes went into the hands of the maker, as requested, they would be extinguished, refused to give them up and sent for Ludwigson to come and get them, which he did, and afterwards pledged them to the plaintiff bank for a debt of Low & Ludwigson. After these transactions the mortgage rights of the third opponents arose, and they contend that the payment by Powell of the four months' loan extinguished the mortgage given to secure the twelve months' notes now in suit.

We think not. The agreement between Low & Ludwigson, who furnished the means to extinguish the four months' loan, was that the mortgage notes should be transferred to them as collateral security for the advance. Practically, they simply agreed to take the place of the original lender, and the original debt was extinguished, as to the creditor, by the substitution of another creditor, upon the express condition that the security should be continued as it then existed. It was clearly not the purpose or intention of Powell to extinguish the mortgage, and the manner in which the evidence thereof was delivered to the new creditors did not have that effect. The same doctrine was enforced in the succession of Dolhonde, 21 An. 5.

Judgment affirmed.

Rehearing refused.

No. 5803.

CITY OF NEW ORLEANS *v.* METROPOLITAN LOAN, SAVINGS AND PLEDGE BANK.

The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the exemption from taxation, and there is no conflict with the constitution in levying the present tax.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, assistant city attorney, for plaintiff and appellee. *Braughn, Buck & Dinkelspiel*, for defendant and appellant.

HOWELL, J. The defendant bank being sued for a municipal tax on its capital, objects—

First—That it is a free bank under the laws, and as such its capital is exempt from such tax. This point was decided adversely to this position in the case of the *City v. Bank of Lafayette*, not reported.

Second—The capital of the bank is the property of individuals, and

City of New Orleans v. Metropolitan Loan, Savings and Pledge Bank.

as such already taxed. The record does not contain proof of this fact.

Third—The assessment is erroneous and excessive. The record also fails to show this.

Fourth—Any pretended law by which the city assumes to tax free banks is unconstitutional.

The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the subject, and there is no conflict in the levying of the tax with the constitution in this respect or any other that we can discover.

Fifth—The payment of ten per cent. of the proceeds of unredeemed pledges into the hands of the trustee of the Metropolitan Police District is declared not to be a commutation of taxes.

Judgment affirmed.

Rehearing refused.

No. 4876.

E. B. BENTON v. F. C. MAHAN.

The appellant will not lose his right to appeal because his surety on the appeal bond has become insolvent, and in such case it is the duty of the court to allow a sufficient surety to be substituted. This is precisely what the court below has done. It allowed appellant to give new security within ten days after the trial of the rule which decided the insolvency of the surety on the bond.

Appellant, who refuses to comply with this order and to substitute a new surety, has no right to expect this court to refuse to dismiss his appeal.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J. Jury trial. *Hays & New*, for plaintiff and appellee. *J. S. Bartlette*, for E. E. Chubbuck, subrogated to plaintiff. *M. A. Dooley*, *John Ray*, for defendant and appellant, and *F. C. Mahan*, in *propria persona*.

WYLY, J. In January, 1875, appellee took a rule, in the court below, on the appellant requiring him to furnish new security on the appeal bond, the surety given by appellant having become insolvent. At the trial of this rule, the court decided that the surety was insolvent and ordered appellant to furnish new security within ten days, or the appeal would be set aside. This the appellant has failed to do.

Appellee, therefore, now moves this court to dismiss this appeal because appellant has failed to furnish an appeal bond as required by law. In the answer which appellant has filed to this motion, he alleges that the transcript of appeal was filed in this court November 13, 1873; that the surety on the suspensive appeal bond was declared insolvent on March 17, 1875, subsequent to the filing of the appeal, and that such insolvency is no cause to dismiss the appeal, but it is merely a

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ground for issuing execution. In support of this position he cites the case of *Gray, Macmurdo & Co. v. Lowe & Pattison*, 9 An. 478.

That case decides merely that appellant will not lose his right to appeal because his surety on the appeal bond has become insolvent, and in such case it is the duty of the court to allow a sufficient surety to be substituted. This is precisely what the court below has done. It allowed appellant to give new security within ten days after the trial of the rule which decided the insolvency of the surety on the bond.

Appellant, who refuses to comply with this order and substitute a new surety, has no right to expect this court to refuse to dismiss his appeal. An appeal with an insolvent surety is virtually an appeal with no surety, and this the law does not authorize.

It is therefore ordered that the appeal herein be dismissed at the cost of appellant.

Rehearing refused.

No. 5814.

CITY OF NEW ORLEANS v. E. V. FASSMAN et als.

The duties of the defendant, while acting in his official capacity of wharfinger was fixed by law. Compensation is an equitable remedy, and never takes place when it would be against good conscience. This case is similar to the case of *city of New Orleans v. Finnerty et al.*, previously decided, and must be controlled by the principles therein announced.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, assistant city attorney, for plaintiff and appellee. *Cotton & Levy*, for defendant and appellant.

LUDELING, C. J. This is a suit against E. V. Fassman, late deputy wharfinger of the First District of New Orleans, and his sureties, for \$1409 55, with legal interest from eleventh November, 1874, being for moneys collected by him in his official capacity for the plaintiff. The defense is that the city owed him a like amount for services rendered, and that the claim of the city against him has been extinguished by compensation. The duties of the defendant, while acting in his official capacity aforesaid was fixed by law. See city charter, act No. 7 of 1870, sec. 50. See also ordinance No. 857, Administration Series. "Compensation is an equitable remedy, and never takes place where it would be against good conscience." 7 An. 46, 53; 11 An. 73. This case is similar to the case of *city of New Orleans v. Finnerty et al.* recently decided, and must be controlled by the principles therein announced.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

 Shall v. Executors of Bogart.

No. 4035.

**BOGART SHALL v. P. H. FOLEY AND W. B. CONGER, Testamentary
Executors of WILHELMUS BOGART.**

The plaintiff sues to recover from defendants, testamentary executors of Wilhelmus Bogart, a certain sum of money, which, whilst plaintiff was a minor, said Bogart, acting in the capacity of under tutor, had under his control and management. After becoming of age, plaintiff received, in settlement with Bogart, certain promissory notes and commercial papers in which Bogart had invested plaintiff's funds in 1860, and of which a considerable portion subsequently turned out to be worthless. After having kept the aforesaid obligations until 1871, a period of seven years, and after prescription has accrued, he now tenders them back on the ground of his having been induced to receive them in settlement by fraudulent misrepresentations.

If said obligations and commercial papers were worthless at the time he received them, plaintiff must have become acquainted with that fact not long after, and might have used more diligence in seeking redress, when it was in his power to put the other party in the same situation he was in when delivering the assets to plaintiff. Therefore by his own laches the plaintiff has foregone the right he originally had to exact from the manager of his affairs a rigid accountability.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. John Ray, Semmes & Mott*, for plaintiff and appellee. *Hunton & Grover, Johnson & Denis*, for defendants and appellants.

TALIAFERRO, J. The plaintiff seeks to recover from the testamentary executors of the decedent, the sum of thirty-five thousand dollars, with interest at eight per cent. per annum from nineteenth of November, 1858, being, as he alleges, for money inherited by him during his minority from the successions of his father and his grandmother, and which went into the possession and under the control of Wilhelmus Bogart, who was undertutor to plaintiff, his said grandmother, up to the time of her death, having been his tutrix. He alleges that, after he became of age, the said Bogart presented to him as his estate certain notes and commercial paper, in which he informed plaintiff his funds had been invested; that he received in error these notes, which for the most part were against insolvent parties and proved of no value to him. He seeks relief in this action from this alleged fraud practiced upon him by his former under tutor and prays judgment against his succession for the amount claimed.

The defendants filed the plea of *res judicata*, relying upon a judgment of the Second District Court rendered in January, 1870, homologating their final account as executors and ordering the entire estate of Wilhelmus Bogart to be distributed in accordance therewith; they allege that the plaintiff is bound and estopped by this judgment from proceedings in this suit. They plead the prescription of one, two, three, four and five years, and that plaintiff discloses no cause of action. The exception being overruled, the defendants, reserving their pleas, answered that they owe the plaintiff nothing; that the entire

estate of Wilhelmus Bogart has been distributed by them in conformity with the provisions of the will of said Bogart, under a judgment and decree of the proper court homologating the final account of the executors, and that there is no property in their hands belonging to the succession with which to pay its debts, if any exist against it.

There was judgment rendered in favor of the plaintiff for \$26,080 26, with five per cent. interest thereon from the sixteenth of January, 1860, until paid, less certain amounts detailed in the judgment. The defendants appealed.

It appears by the evidence that Wilhelmus Bogart had under his control a large sum of money belonging to the minor, which he invested in commercial paper about the year 1860, before the commencement of the late war. At the time of the investment these securities were doubtless good, and there were reasons to suppose the investment was one advantageous to the then minor. In 1864, after the plaintiff had attained his majority he had a settlement with Bogart and received these notes and obligations as his estate or property, and received likewise in money \$1443. This was in June, 1864. He kept these papers, or such of them as he failed to collect, until the time of filing this suit in November, 1871, a period of more than seven years, and now sues the executors of Bogart to recover from them the sum of \$35,000, with eight per cent. per annum interest from the nineteenth of November, 1858, on the ground of fraud practiced upon him by Bogart and by inducing him by misrepresentations that the notes and obligations were his property. He alleges in his petition that he now tenders these notes and obligations back; but of what avail to the defendants would be the tender to return the notes after the plaintiff held them until they were prescribed? He did collect from these assets by his own showing \$11,245. If, as he asserts, they were worthless when he received them, he must have become acquainted with that fact at no great period of time afterward, and might have used more diligence in seeking redress, and when it was in his power to put the other party in the same situation he was in when he delivered the assets to the plaintiff. Bogart's liabilities were none the less than if he had been tutor, although he was not even undertutor after the expiration of the tutorship by the decease of the plaintiff's grandmother, and it was in the power of the plaintiff within a proper and reasonable time to have held him to these liabilities; but we conclude that by his own laches the plaintiff has foregone the right he originally had to exact from the manager of his affairs a rigid accountability. The conclusion we have reached renders it unnecessary to pass upon the defendants' exception.

It is therefore ordered that the judgment appealed from be annulled,

Shall v. Executors of Bogart.

avoided and reversed. It is further ordered that there be judgment in favor of the defendants, the plaintiff paying costs in both courts.

ON REHEARING.

The re-examination of this case presents nothing that induces us to change the judgment rendered on the first hearing. It may be that some of the securities were not prescribed when the plaintiff brought his suit against the executors. No offer was made by him to return any of them, and it was not until a year elapsed after he was made acquainted with his rights by his legal advisers that he set up his demand.

It is ordered that the decree rendered in the case remain unaltered.

No. 4454.

HENRY TALMADGE v. JOHN WILLIAMS & SONS.

On the faith of a letter of credit given to them by defendants for \$5000, Fish & Butler procured the discount of a draft of \$3500, and sometime afterward one of \$1500, from plaintiff, a banker in New York. On defendants being sued for payment of the latter draft, they rely on a defense which is merely technical. A letter of credit must be interpreted and effect given to it according to the real intention of the parties. In accomplishing that object, it was immaterial whether the drafts were drawn by Fish & Butler in favor of their respective creditors as required in the letter of credit, or in favor of the drawers themselves, to settle with said creditors, as intended, and as they did.

Both drafts were drawn alike, and when John Williams & Sons accepted and paid the first one for \$3500, they thereby conceded there was no objection to the form or wording of the instrument, and they interpreted the letter of credit as the drawers did, and as this court does.

A PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Gibson & Austin*, for plaintiff and appellee. *Clark, Bayne & Benschaw*, for defendants and appellants.

WYLY, J. On tenth September, 1870, defendants gave Fish & Butler, merchants of Arkansas, the following letter of credit, to be used in New York:

"Gentlemen, you are authorized to draw on us to the order of such persons in New York as you may be indebted to, or wish to purchase goods from, to the extent of five thousand dollars, in such sums as may suit your convenience, payable on tenth March next, and your drafts will be honored on presentation and paid at maturity.

"Very respectfully, JOHN WILLIAMS & SONS."

Instead of drawing in favor of their creditors for the sums due them respectively, Fish & Butler found it more desirable to draw the time drafts, payable to their own order, have them discounted and use the

proceeds for the purpose contemplated by themselves and John Williams & Sons.

Accordingly, on twenty-ninth September, 1870, they procured the discount of a draft of \$3500 from plaintiff, a banker of New York, on the faith of the letter of credit, and on third day of October, 1870, obtained from the same party the discount of another draft for \$1500. The proceeds of these drafts were used by Fish & Butler in the payment of their debts or in the purchase of goods. Both were drawn payable to the order of the drawers, and were discounted by plaintiff. The draft for \$3500, the first one, was duly honored and paid, the other for \$1500 was dishonored.

This suit was brought to compel the defendants John Williams & Sons to pay the draft of \$1500.

The defense in this court is, the draft does not conform to the condition of the letter of credit in this, the draft was not drawn in favor of a creditor of the drawers, but to their own order, and plaintiff who discounted it was not a creditor.

The defense is too technical. That the credit given Fish & Butler by John Williams & Sons was used for the purpose contemplated by the parties there can be doubt. The object was that Fish & Butler might draw on John Williams & Sons for five thousand dollars in such sums as might suit their convenience, payable on tenth March, 1871, in order to aid them in settling with their creditors and to purchase a stock of goods.

In accomplishing that object it was immaterial whether the drafts were drawn in favor of the respective creditors or in favor of the drawers themselves.

The letter of credit must be interpreted and effect given to it according to the real intention of the parties. Both drafts were drawn alike, and when John Williams & Sons accepted and paid the first one for \$3500, they thereby conceded there was no objection to the form or wording of the instrument, and they interpreted the letter of credit as the drawers did and as we do.

It is therefore ordered that the judgment herein in favor of plaintiff be affirmed with costs.

HOWELL, J., *dissenting*. The plaintiff seeks to make defendants liable for the amount of a draft drawn by Fish & Butler on them, which they refused to accept. The action is based on the following letter:

“NEW ORLEANS, September 10, 1870.

“Messrs. Fish & Butler, Pine Bluff:

“Gentlemen—You are authorized to draw on us to the order of such

Talmadge v. Williams & Sons.

persons in New York as you may be indebted to or wish to purchase goods from, to the extent of five thousand dollars in such sums as may suit your convenience, payable on tenth March next, and your drafts will be honored on presentation and paid at maturity.

"Very respectfully,

JOHN WILLIAMS & SONS."

Upon this letter Fish & Butler drew two drafts in New York to their own order, discounted them with the plaintiff and used most of the funds in paying their creditors and buying goods in said city. One of the drafts was accepted and paid, but acceptance of the other was refused, and this suit is resisted on the ground that it was not drawn in accordance with the conditions of the letter of credit, that is, not drawn to the order of persons whom the drawers owed, or from whom they purchased at the time.

It is contended on behalf of plaintiff that defendants having accepted and paid one of the drafts, they placed a construction on the letter which bound them to honor the second. Had the second draft been given to and received by plaintiff after knowledge that the first was accepted, this position would be true; but the evidence shows that it was not presented to defendants for acceptance until some time after the first had been accepted, and hence plaintiff could not have been influenced by that act of the defendants in discounting the second draft.

We are of opinion that the defendants were justified in their refusal. Letters of credit are not to be enlarged or varied by the bearers of them, but are to be followed strictly in all material points and conditions. The defendants were willing to bind themselves in a specific manner for the benefit of their correspondents for reasons satisfactory to themselves, and some of which may readily be surmised.

Drafts to the order of and indorsed by the merchants from whom goods had been or might be purchased, would bear the obligation or endorsement of the payees, and bear evidence that they had been used for the purpose for which the credit had been extended. The draft in suit was drawn to the order of the holders of the letter and endorsed by the plaintiff only for collection, and the evidence shows that some of its proceeds at least did not go for the payment of goods as designed by the defendants. This form of using the letter would enable the parties to divert the whole proceeds of the drafts.

The doctrine of strict conformity to all the material conditions of a letter of credit was established very early in the jurisprudence of this country. I have not found any authority to the contrary. See 2 Wheaton, 66; 1 Peters 283; 4 Peters 121; 2 Story 241; 16 La. 499.

Rehearing refused.

No. 5765.

CITY OF NEW ORLEANS v. GLOBE MUTUAL LIFE INSURANCE COMPANY.

The city of New Orleans, by a special act No. 73, April 26, 1872, is declared not to be restrained in requiring a license from the Insurance Companies within her boundaries, by either the act No. 42, March 3, 1871, or act No. 14, March 8, 1872, which provided for the general revenue of the State, and on which defendant relies in the suit instituted against it by the city of New Orleans for the recovery of a license tax.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, assistant city attorney, for plaintiff and appellant. *Samuel L. & C. L. Walker*, for defendant and appellee.

MORGAN, J. The city sues the defendant for three hundred dollars license tax. The defense is that by the third section of the act No. 42 of March 3, 1871, paragraph 15, "no insurance company, whose license tax shall be one thousand dollars, shall be liable to any assessment throughout the State, other than that imposed by this article and by section 6 of this act." The sixth section provides that "from every insurer or insurance company transacting an insurance business in this State, there shall be collected, in addition to the license in such cases hereinbefore provided for, an annual tax of one per centum upon the gross amount of the premiums earned each year from policies issued through agencies in this State."

Paragraph 15 of sec. 1 of act 14 of fifth March, 1872, enacts that no insurance company whose license tax shall be one thousand dollars shall be liable to any other assessment, State, parish or municipal, throughout the State, other than that imposed by this article and by section six of this act." Section six of this act simply ordains that the act shall take effect from and after its passage.

If these laws stood alone, there would be little room for interpretation. Judgment would necessarily be for the defendant. But we are reminded by the counsel for the city that the last act under which defendant claims exemption is the act which provided a general revenue of the State, and was approved on eighth March, 1872, and that on the twenty-sixth April of the same year, the Legislature in act No. 73 declared that "no provision in any general law of the State limiting the power of taxation by the several cities, towns, parishes and other corporations, shall be held to apply to the taxes of the city of New Orleans herein or otherwise specially authorized to be levied." This is a special statute, and it authorizes among other things the levy of a tax for the support of the city government.

It is not disputed that the defendant is protected only by the statute of the fifth of March, 1872. It seems to us clear that the section of that act which is relied upon is controlled by the sixteenth section of the act No. 73, 1872 which expressly declares that no provision in any

City of New Orleans v. Globe Mutual Life Insurance Company.

general law of the State limiting the power of taxation by the several cities, towns, parishes and other corporations shall be held to apply to the taxes of the city of New Orleans, which were therein or otherwise specially authorized to be levied. In the case of the City v. Salamander Insurance Company, 25 Au. 650, the question as to the liability of the company for a license tax was not before us.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the plaintiff and against the Globe Mutual Life Insurance Company for the sum of three hundred dollars license tax, with five per cent interest thereon from the first of May, 1872, until paid, with lien and privilege according to law, and that the injunction obtained against them be reinstated and made perpetual; the costs to be borne by the defendants.

No. 5886.

ALBIN ROCHEREAU v. CHARLES P. BOBB, individually and as Testamentary Executor, et al.

The question in this instance is whether certain articles found on a mortgaged tract of land, seized and sold by plaintiff and adjudicated to him as part of the mortgaged property, were covered by said mortgage, and in that case whether they could be afterwards seized, advertised and sold by defendant individually and as testamentary executor of the late William Bobb. The decision of this court is in favor of the plaintiff, on the grounds that the objects now in litigation were found on the premises seized; that they were used in carrying out the industry to which the real estate was subjected, and therefore that said property in dispute was properly seized, advertised, appraised and sold as subject to the mortgage of the plaintiff, to whom it was adjudicated on the sale thereof.

APPPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. O. E. Schmidt*, for plaintiff and appellant. *R. Shackelford*, for defendant and appellee.

MORGAN, J. A. Rochereau & Co. held a mortgage against certain real estate owned by William Bobb. The real estate consisted in several adjoining tracts of land, situate in the parish of Jefferson, operated, principally, as a brickyard and sawmill. The mortgage, in terms, covered the buildings, improvements and appurtenances thereunto belonging.

William Bobb died. His widow, as widow in community, legatee and testamentary executrix, represented in part his estate.

Rochereau & Co. proceeded against her in her representative capacity, and caused the property mortgaged to be seized.

According to the inventory made by the sheriff, he took possession, as having been seized in the suit, of two patent brick machines, with boiler, engine, supply pumps, etc.; two sand sifters, four tempering

wheels, sand boxes, fifty-three brick molds, a number of brick boards, a number of broken wheelbarrows, a number of racks and clapboards, one wooden pump, ten iron-wheel brick trucks, three carts with wheels attached, nineteen cart bodies, a number of cart wheels, a lot of harness, a lot of doubletrees, one feed box, a spring scale, a grindstone, one windlass, a lot of blacksmith's tools, anvil, bellows, etc.; two crowbars, a lot of carpenter's tools, workbench, etc.; one corn mill, a lot of agricultural implements; a sawmill, with two boilers, engine saw, framed carriages, saws, rollers, belts, cars, pumps, etc.; a dredgeboat, with the machinery and apparatus thereof.

The tracts and parcels of land, "together with all and singular the buildings and improvements thereon and appurtenances thereof," were advertised for sale, in obedience to the order of seizure. The land was subdivided according to law. Appraisers were appointed on one side and on the other, to value the property which was about to be sold, and the articles above enumerated were estimated, each article upon the lot of ground upon which it was found. The property was sold, and Albin Rochereau became the purchaser thereof. His deed of sale, from the sheriff, recites the articles which we have detailed.

Subsequently, Charles Bobb, one of the executors of William Bobb, applied for and obtained an order to sell the above described property as belonging to the succession. Plaintiff enjoined the sale on the ground that the property seized belongs to him.

The district judge maintained the injunction, except in so far as the steam dredgeboat and machinery, the cornmill and stone, the tools in the blacksmith shop, the oil tank and the contents of the toolhouse. Rochereau appeals. Defendant asks for an amendment of the judgment in his favor.

Considering that the property in litigation was found on the premises seized; that it was all used in carrying out the industry to which the real estate was subjected; that the carpenter's tools and blacksmith's tools were used as implements for carrying on the industry to which the land was subjected; and considering that the property in dispute was seized, advertised, appraised and sold as subject to the mortgage of A. Rochereau & Co., and that at the sale thereof Albin Rochereau became the purchaser thereof, we are of opinion that he acquired title to the same; that it was improperly advertised for sale as the property of the succession of Bobb, and that plaintiff's injunction should have been perpetuated *in toto*.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended, and that the injunction issued by the said court be reinstated and perpetuated *in toto*, and that defendant pay costs in both courts.

State ex rel. Milliken v. Ward.

No. 5798.

STATE ex rel. A. A. MILLIKEN v. S. J. WARD.

This suit is brought under the intrusion act. From all this court is able to gather from this record, the relator has no cause of action. This court does not understand that defendant has usurped or intruded into the office of recorder, or placed it out of the power of relator by any unlawful force or any illegal means to perform the duties of recorder, if legally vested with that power. He claims, as mayor, the right to exercise certain functions which the relator claims as belonging to the office of recorder. It is not seen how the relator can maintain his action as one coming under the provisions of the law for preventing the usurpation of or intrusion into an office.

APPPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. W. H. Wise*, district attorney, *Rice & Whitaker* and *A. W. O. Hicks*, for relator and appellee. *D. M. Caliham, W. A. Seay, J. W. Duncan* and *Merrick, Race & Foster*, for defendant and appellant.

TALIAFERRO, J. This suit is brought under the intrusion act. The complaint of the relator is, that holding a commission of the Governor of the State as recorder in and for the city of Shreveport, the defendant, who is mayor of Shreveport, has usurped and intruded into the office of recorder of said city and illegally exercises all the powers and privileges belonging to the office of recorder, and prevents the relator from exercising and performing the duties appertaining of right to that office, and from receiving the fees and emoluments of the same. He prays judgment declaring him the lawful recorder of the city of Shreveport and entitled to all the fees, benefits and emoluments belonging by law to that officer.

The defendant denies the allegations of the plaintiff which relate to usurping and intruding into the alleged office of recorder of Shreveport, for the reason, as stated by defendant, that there is no such office. He avers that the act of the Legislature of March 9, 1869, establishing the office of recorder for the city of Shreveport, and the subsequent act of March 16, 1870, defining more particularly the jurisdiction of the recorder's court of said city, have both been repealed by the act of the Legislature No. 98, of the twenty-seventh of April, 1871, incorporating the city of Shreveport, defining its limits and providing for its better police and municipal government. The defendant contends that as mayor he is authorized to enforce the city ordinances, and that that power can no longer be exercised by the recorder.

There was judgment in favor of the relator, and the defendant has appealed.

From all we are able to gather from this record the relator has no cause of action. We do not understand that the defendant has usurped or intruded into the office of recorder, or placed it out of the power of the relator by any unlawful force or any illegal means to perform the duties of recorder if legally vested with that power.

State ex rel. Milliken v. Ward.

He claims, as mayor, the right to exercise certain functions which the relator claims belong to the office of recorder. We do not see that the relator can maintain his action as one coming under the provisions of the law for preventing the usurpation of or intrusion into an office. It is therefore ordered that the judgment appealed from be annulled and reversed. It is further ordered that this suit be dismissed at the relator's costs.

No. 5892.

STATE ex rel. CITIZENS' BANK OF LOUISIANA v. BOARD OF LIQUIDATORS.

This is a proceeding by mandamus to compel the Board of Liquidators to fund a certain promissory note for two hundred thousand dollars with eight per cent interest made by the Governor of the State on the twenty-seventh of February, 1872, and secured by a pledge of forty warrants of five thousand dollars each, subject to a credit of \$120,000, amount of bonds received in exchange for said warrants under act No. 3 of 1874, known as the "Funding act."

The law does not make it the duty of the liquidators to exchange the bonds authorized by act No. 3 of 1874 for anything but the bonds of the State and certain warrants specified in section 3.

Section 3 of said act is the only part thereof that confers authority to make such exchange, and it designates only "all valid outstanding bonds of the State and valid warrants drawn previous to the passage of this act by the respective Auditors, except warrants issued in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants."

The words "bonds and warrants" are here repeated to leave no doubt as to the object of the law, and the proviso which immediately follows declares: "That the holder of any 'bond or warrant' rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided for by this act." Therefore only the holders of outstanding bonds and valid warrants can appeal to the courts for relief.

Lest there should be any doubt, section five declares "that the consolidated bonds herein authorized shall be held and used by said Board of Liquidators only for the purpose of exchange as aforesaid"—that is, for the outstanding bonds and valid warrants.

The relator having voluntarily accepted the terms of the law and taken sixty per cent. of its whole claim against the State by funding the warrants held by it, the purpose of the act as to said debt has been attained, and the whole and only debt of the State due to the relator in this transaction has been funded, and the indebtedness of the State, *pro tanto*, has been reduced and restricted according to the intent and object of the act.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. Pitot, and G. L. Hall*, for relator and appellant. *A. P. Field*, Attorney General, *J. B. Cotton*, and *J. Q. A. Fellows*, for respondent and appellee.

HOWELL, J. This is a proceeding by mandamus to compel the Board of Liquidators to fund a certain promissory note for two hundred thousand dollars, with eight per cent. interest, made by the Governor of the State on twenty-seventh February, 1872, under section two of act No. 12 of 1872, and secured by a pledge of forty warrants

of five thousand dollars each, issued by the State Auditor under said section; said note principal and interest being subject, as alleged, to a credit of \$120,000, amount of bonds received in exchange for said warrants under act No. 3 of 1874, known as the "Funding act."

The defense is that there is no law authorizing the funding of said note, such evidence of the State's obligations not being specified in the third section of the said funding act, and the warrants issued for the same debt having been funded by the relator, the entire obligation of the State for the said debt of \$200,000 is by the provisions of said act merged in the bonds exchanged therefor, and further that there is no law authorizing interest to be paid on said debt.

The writ of mandamus can issue only to compel the performance of a ministerial duty and the question (conceding that the note evidences an existing debt) is, does the law make it the duty of the liquidators to exchange the bonds authorized by act No. 3 of 1874 for anything but the bonds of the State, and certain warrants specified in section 3?

A careful reading of the said act constrains us to answer the question in the negative.

Section three of said act is the only part thereof that confers authority to make such exchange, and it designates only "all valid outstanding bonds of the State and all valid warrants drawn previous to the passage of this act by the respective Auditors of Public Accounts of the State on the treasurer thereof, except warrants issued by the Auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants." The words "bonds" and "warrants" are here repeated to leave no doubt as to the object of the law, and the proviso which immediately follows, declares "that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act." Only the holders of outstanding bonds and valid warrants can appeal to the courts for relief. And lest there should be any doubt, section five declares "that the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid," that is for the outstanding bonds and valid warrants.

Sections 12 and 13 invoked by the relator refer to other subjects and not to the duty of funding, and we are not authorized to enlarge the objects and purposes of the act, especially where the language is so clear and explicit. To do so would be legislation on our part.

We have only to apply the law as it is in all its provisions, and we

State ex rel. Citizens' Bank of Louisiana v. Board of Liquidators.

must say that the relator having voluntarily accepted its terms and taken sixty per cent. of its whole claim against the State by funding the warrants held by it, the purpose of the act as to said debt has been attained and the whole and only debt of the State due to the relator in this transaction has been funded and the indebtedness of the State, *pro tanto*, has been reduced and restricted, as section thirteen, invoked by relator, declares is the intent and object of the act.

Any other construction of the said act in this case would give the relator an advantage over other creditors of the State, who may choose to accept the terms of the act.

Judgment affirmed.

Rehearing refused.

No. 6000.

STATE ex rel. LIQUIDATORS OF SALAMANDER INSURANCE COMPANY v.
JUDGE OF THE FOURTH DISTRICT COURT, parish of Orleans.

Where the evidence showed that the existing liabilities of the surety on the appeal bond exceed his assets in this State, but where he testifies that he has in another State of the Union property worth a sum much larger than all his liabilities:

Held: That he is a good surety in this State. The law does not require the property of the surety, but only the person or residence of the surety to be within the State.

APPPLICATION of a writ of prohibition against the judge of the Fourth District Court, parish of Orleans. *A. & W. Voorhies*, for relator. Judge *Lynch*, in *propria persona*.

HOWELL, J. Pending the appeal in the case of *C. N. Prudhomme v. Salamander Insurance Company*, No. 4078, the sureties on the appeal bond were declared insufficient, and the defendant company (appellants) were allowed ten days to furnish other security. Another bond was given with Louis Lalaurie as surety. A rule was taken to test his sufficiency, and after hearing evidence the district judge concluded that he was insolvent and authorized the issuance of execution on the judgment appealed from, whereupon this proceeding was taken.

The evidence brought up shows that the existing liabilities of the surety exceed his assets in this State; but he testifies that he has in the State of Missouri property worth \$60,000, which is largely greater than all his liabilities, and the question is, is he a good surety in this State?

The question was practically decided in the affirmative recently in the case of *State ex rel. Fosdick v. Judge of Sixth District Court*, not reported, where this court held that the law did not require the property, but only the person or residence of the surety to be within the State, and for the reasons therein it is ordered that the prohibition herein be made perpetual.

No. 5778.

STATE OF LOUISIANA v. PETE PHILLIPS.

The statute No. 124 of the General Assembly of 1874, conferring on the judge of the Superior Criminal Court the power to appoint an attorney to act in his place, is unconstitutional, because it provides a mode for choosing judges different from that prescribed in the constitution.

It would be obnoxious to an additional objection, if the assumption of the State is correct, that Braughn, the attorney appointed by the judge of the Superior Criminal Court to act in his place, was a *de facto* officer. In that case, the statute would provide for having two judges for the Superior Criminal Court, whereas article 83 declares "that for each court, one judge learned in the law, shall be elected."

Instead of authorizing the enactment of section 10 of act No. 124, article 90 of the constitution forbids it in terms of command. It directs the judge when and how he shall select another to preside in his place. Obviously this article did not confer any power upon the General Assembly; but, by indicating precisely how and when the judge shall select another to preside in his stead to try certain causes, it excludes other modes of selection and other causes; and as the manner of choosing a judge, provided for in section 10 of act No. 124 differs from that prescribed in article 90, the said section is null and void.

A PPEAL from the Superior Criminal Court, parish of Orleans. *G. H. Braughn*, attorney at law, acting in the place of Judge *Atocha*, disabled by sickness. *A. P. Field*, Attorney General, *John McPhelin*, district attorney, for plaintiff and appellee. *J. J. Foley*, for defendant and appellant.

LUDELING, C. J. The defendant, having been convicted of the crime of perjury and sentenced to imprisonment at hard labor for five years, has appealed from said judgment.

It will be necessary to notice only the first assignment of error, which is in the words following:

"The trial and sentence was *coram non judice* in this, that George H. Braughn, Esq., an attorney at law, had no legal right to act as judge in the trial of the accused and pass sentence on him; that the order appointing said George H. Braughn as judge of the Superior Criminal Court is null and void. Section 10 of the act 124 of 1874, under the authority of which said order so appointing said George H. Braughn as judge aforesaid was made, is unconstitutional and obnoxious to articles 83, 90 and 94 of the constitution of the State."

The State assumes the position that Mr. Braughn was a *de facto* judge, and that his right to hold the office can not be questioned collaterally. In his brief the Attorney General says:

"We assume the position that the question of Judge Braughn's authority to act as judge of the Superior Criminal Court on the trial of this case, can not be heard and determined by this court on this appeal.

"That if the court, from an examination of the record, finds that Braughn was a *de facto* officer when he tried the case, the validity of his acts will not be questioned.

"This position is founded upon a rule of law which has been repeatedly recognized by the Supreme Court of this State, and of other States; *i. e.*, that the acts of *de facto* officers are binding as to third parties.

"Whether the appointment of Braughn as judge of said court was or was not legal, can only be considered in a suit properly instituted, having for its object his vacation of the office into which he has intruded, or which he has usurped, or which, from any cause, he illegally holds.

"Any other mode of attacking his powers, or the legality of his acts considered only as a judge, would be subject to the objection that it is done by third parties, and done collaterally in proceedings the issues in which were made for wholly different purposes—to which the judge is not a party—and can not be incidentally made a party by plea or exception, and be thus required to contest his *de jure* right to act as a judge in a particular case.

"He can only be required to show in any case that he is acting under a color of title. On these points authorities are abundant to sustain what we have said. We refer to 15 Mass. 183, 171; 9 Johnson 135; 3 Abbot Dig. 352; U. S. Dig. vol. 2, 1871, p. 519; 3 An. 633; 10 An. 524; 13 An. 607; 22 An. 33; 16 Peters 71; 13 An. 404; 25 An. 548, 671."

The proposition, that a *de facto* officer's right to the office held by him can not be attacked collaterally, is unquestionable. But the error in this argument is in assuming that Mr. Braughn was a *de facto* officer. Mr. Braughn did not pretend to hold the office of judge of the Superior Criminal Court, but, on the contrary, he recognized the right of Judge Atocha to said office, and he only claimed to exercise the functions of that office under a delegation of power from Judge Atocha. The right of Judge Atocha to said office was never disputed by Mr. Braughn, and his right to preside in that court would have been acknowledged by Mr. Braughn and the people any day during all the time Mr. Braughn acted under the said delegation of authority. Therefore, the question about the validity of a *de facto* officer's acts can not arise in this case.

The question is, had the Judge of the Superior Criminal Court the right to appoint an attorney to act in his stead, as he did by the following general order rendered in chambers:

"NEW ORLEANS, February 20, 1875.

"ORDER.—The judge of the Superior Criminal Court for the parish of Orleans, A. A. Atocha, Esq., being temporarily unable to act in his capacity of judge, by reason of severe illness, it is ordered, pursuant to the provisions of section 10 of act No. 124 of the General Assembly

of the State, approved April 9, 1874, and under the power and authority granted, that George H. Braughn, Esq., an attorney at law, who is duly qualified, be and he is hereby appointed to preside as judge of the Superior Criminal Court for the parish of Orleans, during the inability of the judge to act, as above set forth, and shall, during the time he shall act, have the same powers as the judge of the court. It is further ordered that a copy of this order be forthwith communicated to the Governor, Attorney General, Secretary of State, district attorney and sheriff of the criminal courts. "A. A. ATOCHA,

"Judge of the Superior Criminal Court of parish of Orleans."

It seems to be conceded that the act No. 124 of the General Assembly of 1874 confers this power on the judge of the Superior Criminal Court, if it be constitutional. Is it constitutional? Article 73 of the constitution provides that "the judicial power shall be vested in a Supreme Court, in district courts, in parish courts, and in justices of the peace." And article 83 of the constitution declares that "the General Assembly shall divide the State into judicial districts, which shall remain unchanged for four years; and for each district court, one judge, learned in the law, shall be elected for each district by a plurality of the qualified electors thereof. For each district there shall be one district court, except in the parish of Orleans, in which the General Assembly may establish as many district courts as the general interests may require," etc.

In 1853 the General Assembly passed an act to provide for the trial of recused cases out of New Orleans, by which the recused judge was authorized to select three members of the bar in attendance, from whom one should be chosen, by lot, to try the cases. This court held that said act was unconstitutional, because it provided a mode for choosing judges different from that prescribed in the constitution.

The act No. 124 is obnoxious to the same objection. It would be obnoxious to an additional objection, if the assumption of the State, that Mr. Braughn was a *de facto* officer, were correct; in that case the statute would provide for having two judges for the Superior Criminal Court, whereas article 83 declares that "for each court, one judge, learned in the law, shall be elected," etc.

However, it is contended that the decisions above referred to, reported in 9 An. 62, and 10 An. 642, were made under the constitution of 1852, and that article 90 of the present constitution was not to be found in the constitution of 1852.

This is true—but instead of authorizing the enactment of section 10 of act No. 124, article 90 forbids it. In terms of command, it directs the judge when and how he shall select another to preside in his place. It provides, that "in any case, when the judge may be recused, and

when he is not personally interested in the matter in contestation, he shall select a lawyer, having the qualifications required for a judge of his court, to try such cases. And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case."

Obviously this article did not confer any power upon the General Assembly; but, by indicating, precisely, how and when the judge shall select another to preside in his stead to try certain causes, it excluded other modes of selection and other causes; and, as the manner of choosing a judge, provided for in section 10 of act No. 124, differs from that prescribed in article 90, the said section is null and void.

It is therefore ordered that the verdict and judgment in this case be annulled; and it is further decreed that the case be remanded to the court *a qua* to be tried according to law.

Rehearing refused.

No. 5860.

WIDOW E. LEFRANC, *ex parte*, on Rule to have Inscriptions of Taxes and Judgments for the same erased.

The proceeding by rule to annul the judgments complained of was irregular and inadmissible.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Henry O. Dibble*, for plaintiff and appellee. *Samuel P. Blanc*, assistant city attorney, for defendant and appellant.

TALIAFERRO, J. The plaintiff in this case proceeded by rule against the city of New Orleans to show cause why various inscriptions for city taxes against her property, for several years on the rolls in custody of the Administrator of Finance, should not be canceled and all judgments thereupon annulled and set aside. Judgment was rendered in favor of the plaintiff and the city of New Orleans appealed.

The defendant, by its counsel, filed an exception to the proceeding of the plaintiff, averring that the various taxes in favor of the city against the property of the defendant have in due course of law become merged in judgments which can not be annulled in the manner pursued by plaintiff; that plaintiff shows no cause for annulling the said judgments, and the plea of prescription is interposed. We think the exception should be maintained. The proceeding by rule to annul the judgments complained of was irregular and inadmissible. Code of Practice, art. 610.

It is therefore ordered that the judgment of the lower court be annulled, avoided and reversed. It is further ordered that the exception be maintained and the suit dismissed at the plaintiff's cost.

Succession of Haggerty.

No. 5737.

SUCCESSION OF MICHAEL R. HAGGERTY. Oppositions to Account of Administrator.

In this instance the account and tableau of distribution, to which there are three oppositions, were homologated so far as not opposed. But this order or judgment was not signed, so far as this record shows.

This omission or neglect is attempted to be supplied by a memorandum in the following words written on the margin of the page on which the unsigned judgment of homologation is found: "The original of this judgment having been duly signed on the account, was lost or mislaid. J. G., Deputy Clerk." This certificate or memorandum is unauthorized by law, and can not supply the defect or omission. If the judgment was signed the fact should have been proved, like any other fact, by legal evidence.

Besides, it appears that the account was homologated without proof, except that the account had been advertised.

The administrator having appropriated the proceeds of the personal as well as real property of the succession to the payment of a judicial mortgage, to the exclusion of the ordinary creditors, the judge *a quo* correctly maintained the opposition of Claflin & Co. to this distribution, and directed that only the proceeds of the real property be applied to the payment of the judicial mortgage, and that the proceeds of the personal property be distributed among the creditors.

The court *a quo* did not err in rejecting the claim of Thomas Dugan for a privilege. Dugan had rented a store to the deceased, and the claim, to secure which he pretends to have a privilege, was for damages done to the building. If the law gives a privilege for such a claim (unliquidated damages) the claim was not recorded, and the personal property in the leased premises had been removed.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. E. Bermudez*, for administrator, appellee. *T. Gilmore & Sons*, for J. J. Haggerty, opponent and appellant. *Clark, Bayne & Renshaw* and *Robert G. Dugué*, for T. S. Dugan, opponent and appellant.

LUDELING, C. J. The administrator of the estate rendered an account and filed a tableau of distribution, which was duly advertised. Three oppositions were filed to the tableau of distribution, and on motion the account and tableau were homologated so far as not opposed. This order or judgment was not signed, so far as this record shows. This omission or neglect is attempted to be supplied by a memorandum, written on the margin of the page, on which the unsigned judgment of homologation is found, in the following words: "the original of this judgment having been duly signed on the account was lost or mislaid. J. G., Deputy Clerk."

This certificate or memorandum is unauthorized by law; and it can not supply the defect or omission. If the judgment was signed, the fact should have been proved like any other fact by legal evidence.

Besides, it appears that the account was homologated without proof, except that the account had been advertised. C. P. art. 1042; 21 An. 511; and 27 An., Succession of Dorville.

After this motion or order had been granted, a supplemental opposition was filed, objecting to the manner in which the proceeds of the personal property of the succession had been distributed. This was

objected to, but the judge allowed the opposition to be filed, and no bill of exceptions was taken to the ruling.

It appears that J. J. Haggerty was a judgment creditor for upwards of \$12,000, and that the administrator had appropriated the proceeds of the personal property as well as of the real property of the succession to the payment of the judicial mortgage to the exclusion of the ordinary creditors. The judge *ad quo* maintained the opposition of Claffin & Co. to this distribution, and directed that only the proceeds of the real property be applied to the payment of the judicial mortgage, and that the proceeds of the personal property be distributed among all the creditors. From this part of the decree J. J. Haggerty, the mortgage creditor, appealed.

And Thomas Dugan appealed from the judgment rejecting his claim for a privilege. Dugan had rented a store to deceased, and the claim, to secure which he pretends to have a privilege, was for damages done to the building. If the law gives a privilege for such a claim, unliquidated damages, the claim was not recorded, and the personal property in the leased premises has been removed from it.

We think the judgment of the district court correct.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 5761.

CITY OF NEW ORLEANS v. MECHANICS' AND TRADERS' BANK.

Where a final judgment has never been revised in the manner provided by the Code of Practice, it can not be practically reopened and reviewed, on a proceeding by rule, by the same court which rendered it, four months after it became final and while the *fiery facias* was in the hands of the sheriff.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanc*, for plaintiff and appellant. *Henry C. Dibble*, for defendant and appellee.

WYLY, J. On November 14, 1874, the city of New Orleans recovered final judgment against defendant for \$6800 for taxes due on the assessment roll of 1873.

On March 20, 1875, *fiery facias* issued on said judgment.

On March 23, three days after the *fiery facias* issued, the defendant took a rule on plaintiff to reduce the assessment on its capital from \$250,000 to \$84,000, and to reduce the tax from \$6800 to \$2100. No answer was filed. The rule, however, was made absolute and the assessment and tax were reduced as prayed for.

From this judgment plaintiff has taken this suspensive appeal. The case presents a question of practice which can not be sanctioned by this court.

Here a final judgment for \$6800, which has never been revised in the manner provided by the Code of Practice, is practically reopened and reviewed, on a proceeding by rule, by the same court which rendered it, four months after it became final and while the *feri facias* was in the hands of the sheriff.

The tax sought to be reduced had long previous been merged into a judgment, and that judgment, the property of plaintiff, can not be reopened, revised, or in any manner disturbed, except as provided by the Code of Practice. And this the defendant has not attempted to do.

It is therefore ordered that the judgment herein be annulled, and it is decreed that the rule herein be discharged at plaintiff's costs in both courts.

No. 5949.

STATE ex rel. PATRICK LEAHY v. THIRD JUSTICE OF THE PEACE.
parish of Orleans, et al.

It was never contemplated that one sued before a justice of the peace could bring his case to be revised before the district or parish court, and before this court also. The right of double appeals is not conferred by the constitution.

A PPEAL from the Third District Court, parish of Orleans. *Mounier, J. Walter H. Rogers and Alfred Shaw*, for relator and appellant, *J. W. Baker*, for respondent and appellee.

LUDELING, C. J. J. H. Grover brought a suit before the Third Justice of the Peace for the parish of Orleans, to obtain the possession of his property from his tenant, the relator. The defendant in that suit claimed to hold under a verbal lease for two years, entered into before Grover bought the property; that the amount of said lease exceeds \$500; and that the justice's court is without jurisdiction, *ratione materiae*. This exception was overruled. The defendant then applied to the Third District Court of New Orleans for a writ of prohibition against said justice of the peace to prevent him from usurping jurisdiction in the case. From the refusal of the district judge to perpetuate said prohibition, this appeal is taken. Conceding that the Third District Court might have granted the prohibition, this court has no power to revise the action of the Third District Court, refusing to perpetuate the prohibition. C. P. 845. The Third District Court could reverse the judgment of the justice's court, on appeal; or if the Third Justice of the Peace had no jurisdiction over the case, an action of nullity could be brought, or the execution thereof might be enjoined,

State ex rel. Leahy v. Third Justice of the Peace, parish of Orleans.

on the ground of its nullity. But it was never contemplated that one sued before a Justice of the Peace could bring his case to be revised before the district or parish court and before this court also. The right of double appeals is not conferred by the constitution.

It is ordered that the appeal be dismissed with costs.

Rehearing refused.

No. 4824.

J. B. HENRY v. MEYER GOLDMAN. LEON G'SELL, Appellant.

An order of seizure and sale can be issued against mortgaged property transferred to a third possessor who assumed the payment of the mortgage debt, where the act of mortgage does not contain the non alienation clause.

Whether proper notice has been given to the parties entitled to it, can not be considered in this appeal from an order of seizure and sale. It has repeatedly been held in an appeal of this kind that the only question is, whether the evidence authorizes the issuing of the fiat.

APPPEAL from the Fifth District Court, parish of Orleans. *Tissot*, Judge of the Second District Court acting in the place of *Oullom*, J. *Braughn*, *Buck & Dinkelspiel* and *Hornor & Benedict*, for plaintiff and appellee. *Charles Lougue*, for Leon G'Sell, appellant.

MORGAN, J. This is an appeal from an order of seizure and sale, appellant being the third possessor of the property seized, having purchased the same subsequent to the execution of the mortgage which is now sought to be enforced. The act of mortgage does not contain the pact *de non alienando*, and, under ordinary circumstances, the proceeding *via executiva* would be an improper one.

But in the act of sale by which the appellant became the purchaser of the property now sought to be sold, he assumed the payment of the notes sued on. This places him in the same position relative to the plaintiff that the original debtor was. The act of mortgage made by the original mortgager imported a confession of judgment. Executory process could have issued against the property while it remained in his possession. It may issue against it when held by a party who has assumed the obligation of the mortgager.

It is therefore ordered that the judgment of the district court be affirmed.

ON REHEARING.

WYLY, J. In this case the question is, can an order of seizure and sale be issued against mortgaged property transferred to a third possessor who assumed the payment of the mortgage debt, where the act of mortgage does not contain the non alienation clause. This question we answer in the affirmative. This court entertained the same opinion in the case of *Woodward v. Dashiell*, 15 La. 185.

Henry v. Goldman.

As to the objection, that there is no evidence of appellant's assumption of the payment of the mortgage debt, the reply is, the deed which he offers to this court to prove he is a third possessor and entitled to appeal, shows also his assumption of the mortgage debt. The question whether proper notice has been given to the parties entitled to it, can not be considered in this appeal from an order of seizure and sale, It has repeatedly been held in an appeal of this kind that the only question is, does the evidence authorize the issuing of the fiat.

It is therefore ordered that our former judgment remain undisturbed.

No. 4457.

G. HENSHAW & SONS v. D. FLANNERY & CO.

No answer having been filed by the defendants, no judgment by default having been entered against them, it follows that there was no issue joined when final judgment was rendered. Without issue joined the court was incompetent to pronounce judgment. The fact that one of the defendants did not answer interrogatories within the legal delays, does not join issue with plaintiffs' demand.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Jacob Hawkins and Tharp*, for plaintiffs and appellees. *W. B. Lancaster*, for defendants and appellants.

MORGAN, J. Plaintiffs sue the defendants on a balance of account. To their petition they attach interrogatories to be answered by Flannery, "under oath and within the legal delays." The order issued as prayed for. Citation, with the service of the interrogatories and the order thereon, was served on Flannery on the second of August, 1872.

On the fifth of November, 1872, on motion of plaintiffs' counsel, and on their showing to the court that the defendants, although duly cited, have failed to answer the interrogatories propounded to them within the legal delay; it was ordered that the interrogatories be taken for confessed, and that judgment be rendered against them for the sum claimed. Defendants appeal.

No answer had been filed by the defendants; no judgment by default had been entered against them. There was, then, no issue joined when final judgment was rendered. Without issue joined the court was incompetent to pronounce judgment. The fact that one of the defendants did not answer interrogatories "within the legal delays," does not join issue with plaintiffs' demand.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the case be remanded to the lower court, to be proceeded in according to law.

State ex rel. Newgass v. Judge of the Superior District Court.

No. 5997.

STATE ex rel. H. NEWGASS v. JUDGE OF THE SUPERIOR DISTRICT COURT, parish of Orleans.

The judge *a quo* refused to grant an appeal from his refusal to grant an injunction in chambers. This court can issue no mandamus in the matter. The judge *a quo* has, in this case, simply refused to act and grant an *ex parte* order upon an *ex parte* showing. This refusal can not be considered as a final judgment or an interlocutory order within the purview of the Code of Practice or any law from which an appeal lies, because it may work an irreparable injury. There is nothing for this court to revise, and hence there is no ground for an appeal. It would be virtually assuming original jurisdiction were an order granted for an injunction, when none had been issued by the lower court. The non-action of the district judge in the premises can not be revised, amended or modified by this court.

APPPLICATION for a mandamus to be issued to the judge of the Superior District Court, parish of Orleans. *Hornor & Benedict*, for relator. Judge *Hawkins*, in *propria persona*.

HOWELL, J. The relator seeks by this proceeding to compel the judge of the lower court to grant him an appeal from a refusal to issue an injunction on an *ex parte* application. He alleges that, in a suit entitled, State ex rel. Robert Ray v. A. Dubuclet, Treasurer, the said judge granted an *ex parte* order of injunction prohibiting the said treasurer from paying any warrants from the funds then or thereafter in the treasury other than those held by the said Ray, and those of same nature held by other persons; that being the holder of warrants the payment of which was thus enjoined and prohibited, he presented a petition, affidavit and bond to the said judge, asking that Dubuclet, treasurer, be enjoined and prohibited from paying any warrants on the funds of 1874, until the right of parties in interest in said suit of Ray v. Dubuclet be finally determined, after proper parties are made thereto or permitted to intervene and be heard, and that upon the said petition the judge wrote the words "injunction refused," whereupon he, the relator herein, asked in due form for a suspensive appeal from said refusal to grant the injunction thus prayed for, but the appeal was refused him, and he now asks for a mandamus to compel it, and for a prohibition forbidding the judge below to take further cognizance of the cause of Robert Ray v. Dubuclet, State Treasurer, and forbidding the said Ray from further prosecuting said case and forbidding the said treasurer from complying with the order in said case, until the further order of this court.

It is clear that the provisional writ of prohibition herein was improvidently issued by us, and the only question to be determined is whether or not the appeal should be granted. We think the simple statement, as made by the relator himself, shows that he has mistaken his remedy and is not entitled to a writ of mandamus.

The only case in our reports, in which an appeal from a refusal to

issue an injunction seems to have been declared allowable, is that of the State v. Judge Lewis, 7 M. 457, decided in March, 1820. Since then no such right seems to have been exercised or recognized. The facts of that case are meagerly reported, but it appears that the parties who asked for the injunction, and whose property was about to be sold, had intervened in a pending litigation. Here the facts are very different. The refusal of the judge can not be considered a final judgment, or an interlocutory order, within the provisions of the Code of Practice or any law, from which an appeal lies, because it may work an irreparable injury. The relator is not without a remedy. The judge has simply refused to act—refused to grant an *ex parte* order upon an *ex parte* showing. There is nothing for us to revise, because the judge rendered no judgment and made no order, and hence there is no ground for an appeal. Further, were the appeal to be brought up and we should say that the judge erred in refusing the injunction, what order or decree could we render, and what would be its character? Would it not be virtually assuming original jurisdiction, were we to grant an order for an injunction when none had been issued by the lower court? What is there for us to revise, amend or modify? Certainly not the non-action of the district judge. We can not in this proceeding examine the merits of the contemplated injunction suit and determine whether or not the injunction should have been granted. The only question to be considered now is whether or not the relator is entitled to an appeal from the refusal complained of. It appears to us very clear that he is not. The appeal could bring before us only the *ex parte* application which was presented to the district judge in chambers, and this tribunal, whose jurisdiction is only appellate, would be substituted for the lower court and would have to refuse or grant the application for the injunction, a matter not within our jurisdiction. We could not say that we would render such a decree or order that he should have rendered; for he rendered none for us to correct. There must be parties to a controversy before us, as well as the subject matter of the controversy, or some proceeding in the lower court. As the record now stands, there is no defendant in the application for an injunction. There was no defendant before the district judge, and we can not order one to be made a party.

In any view that we can take of the subject, we can discover no legal ground for an appeal.

Had what is called a rule *nisi* been taken and, after a hearing, the judge refused the injunction, or had the relator intervened in the suit of Ray, a different question would be perhaps presented. But the relator neither intervened nor asked to be permitted to intervene in said suit of State ex rel. Ray v. Dubuclet, Treasurer, and there were no

proceedings in his, relator's application to the judge for an injunction, to be revised by us. See article 895, Code of Practice.

It is therefore ordered that the writs of mandamus and prohibition issued herein be set aside and dismissed with costs.

MORGAN, J., *dissenting*. The relator presented a petition to the Judge of the Superior District Court, in which he alleged that a large amount of taxes of the revenue of 1874 were about being paid into the treasury, which should be paid to him and to other holders of warrants on the State treasury.

That Robert Ray had filed a suit in that court against the Treasurer, in which he had prayed for and obtained an injunction prohibiting him from paying any other warrants than those held by Ray, or others of like nature, and especially from paying the warrants held by relator and others of like nature; that he is informed by the clerk that the petition is not on file, but that it is in the possession of the plaintiff, and therefore that he, relator, can not know its allegations, and that he only has knowledge of the injunction issued thereon; that relator's warrants are of equal validity, date and rank with those held by Ray, and should be paid equally with Ray's; that the preference allowed by said injunction to Ray is a manifest and irreparable injury to him, relator, and was granted without notice to him, and without furnishing any bond to secure him against the damages he will suffer by the preference given by said injunction; that he has an interest in contesting the claim and pretensions of Ray, but that it is impossible for him at this time, and before the injury shall become irreparable, and that it is necessary to prevent the treasurer from paying any of the warrants drawn on him by the Auditor against the revenues of 1874 until the rights of the parties and all in interest can be definitely settled; that by reason of said suit and the orders thereon, Ray is obtaining a preference contrary to law, and is thus violating the constitution of the State of Louisiana, and is virtually depriving him of his property without due process of law, contrary to the constitution of the United States; that he prayed that the treasurer be enjoined and prohibited from paying any warrants on the revenues of 1874 until the right of parties in interest in the suit of Ray v. Dubuclet can be finally determined, after proper parties are made thereto, or be permitted to intervene and be heard therein; that there be reserved to him his rights for such damages as he may suffer; that his injunction may be made perpetual; that he made the necessary affidavit and offered a sufficient bond; and that the judge rendered judgment as follows: "Injunction refused," and signed it; that he moved for a suspensive appeal from

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this judgment, tendering a sufficient bond therefor, which was refused.

He prays for a mandamus to the district judge commanding an appeal to be allowed him, and for a writ of prohibition forbidding the judge from taking further cognizance of the case of *Ray v. Dubuclet*, forbidding Ray from prosecuting his suit and the Treasurer from complying with the order rendered in that case, until the further order of this court.

In my opinion both orders should be granted.

That the relator had a right to intervene in the suit of *Ray v. Dubuclet*, I think, can not be seriously denied, and that, having intervened, he would be entitled to an appeal from any judgment rendered therein, interlocutory or final, which did him an irreparable injury, is, it seems to me, clear.

In this instance he could not intervene, because there was no petition on the files of the court in which he could file an intervention.

Now, what did the relator ask at the hands of the district judge? Simply that an injunction^e issue prohibiting the Treasurer from proceeding under the injunction issued in favor of Ray until he can intervene in the suit out of which the injunction issued. This the court refused.

I think the relator was entitled to the injunction.

An injunction may compel parties or public officers to do certain acts, as well as restrain them from acting. It is as effective to enforce a right as to prevent a wrong. C. P. 298; *McDonogh v. Calloway*, 7 R. 442, 2 An. 773.

It seems to me that whenever one has the right to enjoin, he has the right to appeal from an order refusing him an injunction in any case where the appellate court has jurisdiction.

In the case of the *State v. Lewis*, 7 M. 457, the court held that an appeal will lie from the refusal of a judge to enjoin a sale.

The relator alleges that he is the holder of certain warrants drawn by the proper officer of the government upon the treasury; that a party has obtained from the district judge an order enjoining the Treasurer from paying any warrants except the one held by him and others of similar character; that the petition upon which the injunction issued is not on the files of the court; he alleges that he is enjoined by this injunction, and prays for a counter injunction until he can intervene and proper parties may be made, that it may be ascertained whether the original injunction properly issued. His application is denied. He asks for an appeal. I think he is entitled to it.

No. 3959

WM. DURBRIDGE v. THE SLAUGHTERHOUSE COMPANY. A. J. OLIVER,
Intervenor.

This court will have nothing to do with a suit springing from a fund created for the purpose of corrupting and improperly influencing members of the Legislature in their action on matters of legislation then before them.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. A. Bartlette, J. Livingston*, for plaintiff and appellant. *A. Voorhies, Horner & Benedict. Semmes & Mott*, for defendant and appellant. *Wooldridge & Thomas*, for intervenor and appellant.

MORGAN, J. The motion to dismiss this appeal on the ground that the record does not contain all the evidence, comes too late. The record was filed in April, 1870. The motion to dismiss was made shortly before the argument.

On the merits we are satisfied, from an examination of the testimony, that the ground from which this action springs was a fund created for the purpose of corrupting and improperly influencing members of the Legislature in their action on a matter of legislation then before them. We will have nothing to do with it.

It is therefore ordered, adjudged and decreed that this appeal be dismissed at appellant's costs.

Rehearing refused.

No. 5996.

STATE ex rel. M. A. PIKE AND JOHN H. PIKE v. THE JUDGE OF
THE SUPERIOR DISTRICT COURT, Parish of Orleans.

A. L. Gusman, alleging an interest in the affairs of a defunct insurance company, applied to the judge of the Superior District Court, parish of Orleans, for a mandamus to compel M. A. Pike and John A. Pike who had possession of the books of the company, to grant him access to the same for examination. On the writ being made peremptory, the relators M. A. Pike and John A. Pike moved for a suspensive appeal, which being granted was subsequently set aside and permitted to operate only as a devolutive one. Whereupon relators applied to this court for a writ of prohibition to be directed to the judge *quo* and the civil sheriff of the parish of Orleans, restraining them from proceeding in the premises. As there is nothing in the record to show that there is an amount exceeding five hundred dollars in dispute, this court has no jurisdiction *ratione materiae*.

APPLICATION for a writ of prohibition against the judge of the Superior District Court, parish of Orleans. *H. B. Magruder*, for relators. *Henry B. Kelly*, for A. L. Gusman. *Judge Hawkins*, in *propria persona*.

TALIAFERRO, J. A. L. Gusman, alleging an interest in the affairs of a defunct insurance company, the books and papers of which being in the possession of Wm. S. Pike as president, during his life time, were

State ex rel. M. A. Pike and John A. Pike v. The Judge of the Superior District Court.

found in his succession after his decease, applied to the judge of the Superior Court for a mandamus to compel Mary A. Pike and John H. Pike, the legal representatives of Wm. S. Pike, deceased, to grant him access at seasonable and proper hours to the said books and papers for examination. The writ prayed for was made peremptory and the relators applied for a suspensive appeal, which was granted on bond with surety in the sum of \$300 as fixed by the judge. The required bond was furnished, but subsequently, on application of Gusman, the judge set aside the appeal as a suspensive one, and permitted it to operate only as a devolutive appeal. The relators thereupon obtained an order of this court requiring the said judge and the civil sheriff of the parish of Orleans to show cause why a writ of prohibition should not issue restraining them from further proceedings in said case. The judge *a quo* and the sheriff answered the rule, and as we think satisfactorily in their behalf.

It is clear that this court has not jurisdiction *ratione materiæ*. See case State ex rel. DeSt. Romes v. The Steam Cotton Press Company, 22 An. 622, and State ex rel. Nugas v. Friedlander, 25 An. 43, and 24 An. 148. Let the writ be discharged.

MORGAN, J., *dissenting*. The plaintiff in the rule out of which this proceeding grows, does not claim to be the owner of the books in question. The relators do not pretend to their ownership.

W. S. Pike, it is alleged, was the President of an insurance company. The books of the company were in his possession. The relators found them among his effects.

No person has been appointed by the parties interested in the insurance company to take charge of them.

The plaintiff took a rule upon Mrs. Pike and John Pike, not for their possession but to be authorized to examine them. He alleges that he owns stock in the company exceeding \$3000. No direct action has been instituted. The proceedings commenced by rule. The judge ordered that the books be subject to the inspection of the plaintiff in rule whenever he pleased to examine them on days not legal holidays between the hours of 10 A. M. and 3 P. M.

From this judgment the relators moved for a suspensive appeal, which was granted upon their furnishing bond in the sum of \$300. Plaintiff in rule then moved to set aside the appeal, which was done, as regards its suspensive effect, upon the ground that the bond was not sufficient.

I can not agree with my brethren in the opinion that we are without jurisdiction *ratione materiæ*. The relators are by the judgment of

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the district judge, condemned to submit to a diurnal visit during every legal day, and during all the business hours thereof. To my mind this involves a great deal more than the sum of five hundred dollars. It gives to the plaintiff an office in the relator's house or at their place of business. It puts a person near them, overlooking their business, and destroys their privacy. Such inconveniences and annoyances are in my opinion of much greater consequence than five hundred dollars.

I think, too, that the bond was sufficient. It was in the sum fixed by the judge, and, as there was neither moneyed judgment to be executed, nor property to be delivered, the bond given was sufficient.

I think the mandamus should be made peremptory.

No. 5192.

THOMAS McNEIL v. PETER J. KRAMER et als. CITY OF NEW ORLEANS in Warranty.

This is a suit to annul a tax sale by a justice of the peace and recover the property thus disposed of. All property seized under writs of justices of the peace, whether the same be movable or immovable, must be appraised and sold in the same manner as property seized and sold by sheriffs. None of the formalities required and made necessary by law to constitute a seizure by the sheriff or other officer of the parishes of Orleans and Jefferson having been complied with in this case, it follows that nullity of the sale is the consequence.

As defendants in their answer set up no reconventional demand for taxes paid by them since their pretended purchase of the land herein decreed to belong to plaintiff, no relief can be given in that regard.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. S. P. Blanc* and *T. Donegre*, for plaintiff and appellant. *Peter J. Kramer*, for defendant and appellee.

TALIAFERRO, J. This is a suit to annul a tax sale. The judgment of the lower court was in favor of the defendant, dismissing the plaintiff's demand, and the latter has appealed.

McNeill, the plaintiff, living in Missouri, bought through his agent, Murphy, residing in New Orleans, two vacant lots in the then city of Jefferson. At that time there were no taxes against the lots, but subsequently the corporation of the city of Jefferson levied upon them a tax of \$7 50, and in October, 1869, instituted suit before the Eighth Justice's Court of Jefferson parish, obtained judgment and caused the lots to be sold. They were adjudicated by the constable of that court to Peter J. Kramer and Jacob Hassinger at the price of \$5. Seven or eight months after this sale, Murphy, the agent, went to the purchasers and offered to redeem the lots, offering to pay a sum larger than was required by law to redeem them, but the purchasers demanded \$200. This extortionate sum Murphy refused to pay, and he brought this suit

McNeil v. Kramer et als.

to recover the property, alleging various nullities in the proceedings and claiming that the pretended sale set up by defendants is null and void. The suit was brought against McNeil as a resident of the State, when in fact he was and still is an absentee. It is insisted that he was never cited, either by citation in the ordinary form or by the notice published in the official journal, made to stand in lieu of citation. The evidence in the record bearing upon this point is, that on trial of the case in the court below, the defendant offered to show by a copy of the newspaper called "The Jeffersonian," alleged to be the official journal of the city of Jefferson, that the required notice had been given by publication in that paper. The plaintiff objected to the introduction of the paper on the ground that it was not shown to be the official journal of the city of Jefferson, and he alleged further that he was able to show, by the testimony of two persons named, that "The Jeffersonian" was not the official journal of the city of Jefferson in 1868 and 1869, when these proceedings were going on, but that "The Standard" and "The Louisiana Register" had successively been the official journal of that city, and that the delinquent tax lists for taxes of 1868 had not been published in either of those papers. An agreement of counsel is found in the record, by which the plaintiff was allowed time to obtain the testimony of the witnesses named, the case to remain open and unsubmitted until the testimony of the witnesses, to be taken out of court, was presented to the court. It appears from a bill of exceptions, embodying the plaintiff's objections to the admission of "The Jeffersonian" as the official journal, that the judge proceeded to judgment in the case without waiting for the testimony desired by the plaintiff, which ruling is also excepted to and appears in the bill. When judgment was obtained against McNeil, proceeded against in the justice's court as a resident of the State, a *feri facias* was issued and the constable returned on the notice of seizure that McNeil was a non-resident. Thereupon a new suit was brought in January, 1870, against McNeil as an absentee for the same tax, and the suit was carried on contradictorily, with a curator *ad hoc* appointed to represent him. Judgment was rendered in this second suit against McNeil. But the *feri facias* issued in the first suit, the old writ in the hands of the constable before the last judgment was rendered, was the *feri facias* under which the lots were sold to satisfy the last judgment. This writ of *feri facias* expired before the day of sale, ninth of April, 1870. It was issued on the twenty-seventh of December, 1869, and was returnable in thirty days thereafter. It was not returned by the constable and a copy taken out in the regular way. The original *feri facias* is annexed to and makes part of the record. It shows that the Eighth Justice of the peace indorsed "renewals" on the back of the writ—the first one

on the twenty-seventh January, 1870; the second, twenty-seventh February, 1870, and the third, twenty-seventh March, 1870. The constable's indorsement across the back of the writ shows there was no return of the writ during the entire interval that elapsed between the day on which it was issued and the day of sale. It is especially urged that there was no legal seizure of the property made. None of the formalities required and made necessary by law to constitute a seizure by the sheriff or other officer of the parishes of Orleans and Jefferson were complied with. Revised Statutes, 3628. All property seized under writs of justices of the peace, whether the same be movable or immovable, shall be appraised and sold in the same manner as property seized and sold by the sheriffs." C. P., article 1145.

It is objected that the notice of seizure served upon the curator *ad hoc* was illegal, because McNeil was represented at the time by Murphy, clothed with plenary powers. The same defect, it is urged, applies to the notice of appraisal. Many other informalities are pointed out in the proceedings in this case as having taken place both before and after judgment. Other objections, urged as showing illegality in the sale of the property, are indicated.

We think it clear that these requirements have not been complied with in this case, and that nullity has thereby resulted. Entertaining these views, we deem it unnecessary to pass on the two bills of exceptions in the record.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed.

It is further ordered that the alleged sale of the property for taxes, and which is set up as defendants' title, be and the same is hereby declared null and void; that the plaintiff be decreed owner of the two lots for which he sues, and that a writ of possession issue according to law and that he be put in possession of the same, the defendants paying costs in both courts.

ON REHEARING.

WYLY, J. On further examination we find no cause to disturb the judgment rendered by this court in this case on May 21, 1875. The judgment under which defendants acquired title was a nullity, and the proceedings in execution thereof were irregular and illegal.

As defendants in their answer set up no reconventional demand for taxes paid by them since their pretended purchase of the land herein decreed to belong to plaintiff, no relief can be given in that regard.

It is therefore ordered that our former judgment remain undisturbed.

No. 5816.

CITY OF NEW ORLEANS v. MARTIN FINNERTY.

Compensation takes place between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debt is the same. It can not be opposed by a fiduciary acting in the line of his duty.

There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to said agent.

No officer of a government, State or municipal, is empowered to pay himself his salary or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he can not pay himself.

The Administrator of Commerce for the city of New Orleans had no power to authorize the defendant, a wharfinger for the second district of said city, to retain a sufficient sum out of the moneys collected by him, to pay his salary and also other employees in the office, and expenses of office. That the same thing has been done in other instances is no justification. Custom can not supersede the law in such cases. If it be a custom, it is a vicious one.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. B. F. Jonas*, city attorney, *Samuel P. Blanc*, assistant city attorney, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

MORGAN, J. Martin Finnerty was appointed by the proper city authorities wharfinger for the second district of the city of New Orleans. He was entitled to a salary fixed by law. He was by ordinance of the city government *ex officio* collector of levee dues, and solely responsible for the collection and payment of the same to the Administrator of Finance. He gave bond for the faithful performance of his duties. The city sues him for a balance of collections, made under the authority of his office, amounting to \$2721 82. His sureties are made parties to the suit. Judgment for the same amount is asked against them *in solido*.

Finnerty claims that the city owes him \$3289 29, on account of his services, expenses of his office, and the payment of employes. And this is his defense. It is admitted that he is a creditor of the city in the sum due by him.

The questions for us to determine are whether Finnerty, a salaried officer of the city, when, acting in the direct line of the duties assigned to his office, collects funds due to the department of the city government to which he belongs, can pay himself the salary attached to the office, other employes of the office, and the expenses thereof, and deposit whatever may remain in his hands in the treasury?

When sued for the amounts collected by him in his official capacity and in the proper performance of the duties of his office, can he plead in compensation the salary due to him, the money he has paid to employes in his office, the expenses of the office; it being admitted that

the salary, the money paid to the employes and the expenses were due when paid, even when they are established by judgment of a court of competent jurisdiction?

We think the questions must be answered in the negative. He accepted the office of wharfinger with all of the advantages, duties and obligations thereof. His advantage was the salary attached thereto. His duties were to collect the moneys due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit, out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debt is the same. It can not be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties by a debt due by the principal to the agent. No officer of a government, State or municipal, is empowered to pay himself his salary or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words, he can not pay himself.

We are informed that the Administrator of Commerce authorized Finnerty to retain a sufficient sum out of the moneys collected by him to pay his salary, and also other employes in the office, and expenses of the office. The answer, we think, to this is that the Administrator of Commerce had no power to grant him such authority.

We are next assured that the same thing has been done in other instances. The reply is that custom can not supersede the law in such cases, and that if it is a custom it is a most vicious one, entirely unjustifiable, and which results in the payment in full of certain favorites, while others, perhaps equally deserving, get only a portion of their earnings. No such result was ever contemplated by the framers of the city charter. All officers of a government, municipal as well as general, have their respective duties in their several departments to perform; all are of the same rank before the treasury, and none can be paid their salaries except in the mode pointed out by law, nor one in preference to another. Counsel for defendant rely upon the authority of Merlin, *verbo* Compensation, part 3, No. 3; Toullier, vol. 7, par. 379; Duranton, vol. 12, No. 520; Pothier, No. 589, and articles in the Justinian Code and Institutes to support the proposition that what is

due by the fisc to an accounting officer is to be compensated by what the officer owes to the fisc. As for example, if a receiver of taxes has in one year paid a larger sum into the treasury than he was accountable for, and the following year he finds himself debtor to the fisc in a like or greater sum, the sum which is due him on the first year, will be compensated by the sum which he owes; and that compensation may be opposed to the State, that is to say to the public treasury, provided that the two debts depend upon the same excise of the same office. Also that compensation may be opposed, not only against debts due to individuals, but even against debts due to towns, corporations or communities.

But nowhere do we find any authority which sustains the proposition, that a public officer charged with the performance of a specific duty, for a fixed compensation to be paid in a manner pointed out by law, has any right to plead in compensation a sum which is in his hands simply because he has not done his duty by depositing it with the proper officer as soon as he had received it, against his salary and the salary of other officers in his department, and the expenses of the office. We have been referred, it is true, to the cases of *United States v. Macdaniel*, 7 Peters, 16; to *United States v. Ripley*, ib. p. 23; to *United States v. Fillebrown*, ib. 28; to *United States v. Ringgold*, 8 Peters, 163.

Macdaniel was a clerk in the navy department, upon an annual salary. He also acted as the agent for the payment of the money due to the navy pensioners, the privateer pensioners, and for the navy disbursements. He received \$280 per annum for his services in the payment of pensioners; and for ten or fifteen years he received one per cent. on moneys paid by him for navy disbursements. He was sued on a balance of account arising out of these transactions. He pleaded that he was entitled to the percentage charged by him. The court decided that he had performed duties not properly belonging to his employment; that he had made, and had been paid, the same charges for ten or fifteen years, without objection; that the Secretary of the Treasury was authorized to employ him in that particular duty, and that he was entitled to compensation therefor.

In Ripley's case, he claimed to be allowed in compensation of sums alleged to be due by him, extra services rendered in the disbursement of funds in preparing plans for fortifications, and for procuring and forwarding supplies of provisions, etc., to troops of the United States beyond the limits of his military command, but the court refused to sanction the charge of the district judge that his claim was well founded, and reversed the judgment in his favor.

In Fillebrown's case the court held that the allowance of compensa-

tion by a fixed salary to the defendant, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund.

The propriety of these decisions we do not question. We think, however, that they do not touch the defendant's case.

Neither do we dispute the doctrine as stated in Ringgold's case that when an action is brought by the United States to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and to turn him round to an application to Congress.

But we return to our original proposition, and repeating what we have already said, are of the opinion that no salaried officer of the city government, whose salary is to be paid in the manner pointed out by law can, while acting in the strict line of his duty, collect money belonging to the city and, when sued therefor, plead in compensation the salary which may be due him, and amounts paid by him to other creditors of the city.

Judgment affirmed.

No. 5855.

STATE ex rel. ALEXIS RIBET v. JUDGE OF THE THIRD DISTRICT
COURT, parish of Orleans.

No complaint being made as to the sufficiency of the surety, the district judge dismissed the appeal mainly upon the ground that the matter in controversy does not exceed five hundred dollars. After granting the appeal, his jurisdiction over the case, except as regards the sufficiency and legality of the bond, was gone.

APPPLICATION for a writ of prohibition against the judge of the Third District Court, parish of Orleans. *Charles Louque*, for relator. Judge *Lynch*, respondent, *in propria persona*.

MORGAN, J. Relator applied for and obtained a suspensive appeal from a judgment rendered by the judge of the Third District Court.

No complaint is made as to the sufficiency of the surety. The district judge dismissed the appeal mainly upon the ground that the matter in controversy does not exceed five hundred dollars. After granting the appeal his jurisdiction over the case, except as regards the sufficiency and legality of the bond, was gone.

The rule ordering him to desist from any further proceeding in the case, and commanding him to send up the record to this court, is made peremptory.

State ex rel. Fosdick v. Judge of the Sixth District Court.

No. 5848.

STATE OF LOUISIANA ex rel. G. A. FOSDICK v. THE JUDGE OF THE SIXTH DISTRICT COURT, parish of Orleans.

The judge *quo* dismissed the suspensive appeal granted, on the ground that the surety on the bond was not the owner of tangible property to the amount of the bond within the jurisdiction of the court. There seems, however, to be no question of the solvency of the surety. It is proved that the surety is worth the amount of the bond and that he resides within the jurisdiction of the court. This is all that the law requires.

APPPLICATION for a writ of prohibition against the judge of the Sixth District Court, parish of Orleans. *L. Madison Day, Ben-tinck Egan*, for relator. Judge *Saucier*, respondent, in *propria persona*.

MORGAN, J. From a judgment obtained against him by Avegno, Fosdick applied for a suspensive appeal, which was granted.

The district judge dismissed the appeal on the ground that the security on the appeal bond was not the security which is required by law. Fosdick asks for a writ of prohibition against the judge of the district court, commanding him to desist from proceeding any further against him or his property in the present controversy. He contends that the judgment of the district court is suspended by his appeal and that the bond furnished by him is, in law, good and sufficient.

There seems to be no question of the solvency of the surety. The objection to him is, as we understand it from the answers of Avegno and the district judge, that he is not the owner of tangible property to the amount of the bond within the jurisdiction of the court.

The article 575 fixes the qualifications of a surety on a suspensive appeal bond. He must be worth the amount of the bond, and must reside within the jurisdiction of the court.

Here the surety is worth the amount of the bond, and he resides within the jurisdiction of the court. This is all the law requires.

The rule is made peremptory.

Nos. 5823 and 5832.

STATE ex rel. JOHN G. EUSTIS v. THE JUDGE OF THE FOURTH DISTRICT COURT, parish of Orleans.

There is no force in the objection of the respondent that appellant in applying for an appeal did not specially ask for a suspensive appeal. He applied for an appeal, and he gave bond within ten days for an amount sufficient for a suspensive appeal.

APPPLICATION for writs of mandamus and prohibition against the judge of the Fourth District Court, parish of Orleans. *T. J. Bartlett*, for relator. Judge *Lynch*, respondent, in *propria persona*.

WYLY, J. The relator's opposition to the tableau of distribution filed by the syndic of the insolvent firm of Bellocq, Noblom & Co.,

State ex rel. Eustis v. Judge of the Fourth District Court.

having been rejected and the distribution of funds ordered pursuant to the statement on the tableau, the relator took an appeal within ten days, the bond being for five hundred dollars, the amount fixed by the judge.

To compel the judge to send up the appeal and to prevent the execution of the judgment in the meantime, the relator sued out in this court writs of mandamus and prohibition which are the subject of the present controversy.

An examination of the evidence on which the respondent acted, satisfies us that the surety is worth over five hundred dollars, the amount of the bond; and from the nature of the case we conclude that five hundred dollars will be sufficient for a suspensive appeal bond. We do not see how the costs can exceed that sum. As appellant is not in possession of the funds in controversy he need only give bond for the amount of costs. 10 An. 345; 20 An. 108. As he did this within ten days the appeal operated a *supersedeas*. C. P. 575.

There is no force in the objection of the respondent that appellant in applying for an appeal did not specially ask for a suspensive appeal. He applied for an appeal, and he gave bond within ten days for an amount sufficient for a suspensive appeal.

It is therefore ordered that the mandamus and prohibition herein be made peremptory and perpetual at the costs of Henry Peychaud, syndic of Bellocq, Noblom & Co.

No. 5695.

CHARLOTTE PAULINE EMEILIE ROMAINE DE LA FERRIERE v. SUCCESSION OF R. ENGLAND.

Where the heirs of a succession have been recognized by a judgment of the Second District Court, parish of Orleans, and put in possession of the property, an action for debt due from said succession must be brought before the ordinary tribunals against the heirs themselves, if they be of age, or against their tutor.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. J. L. Tissot*, for plaintiff and appellee. *Bentinck Egan* for defendant and appellant.

LUDELING, C. J. This an appeal from the Second District Court of New Orleans. The defendant contends that the said court, being a probate court, had no jurisdiction over the case, because the minor heirs of said England had been put in possession of the estate by an order of court, and he cites the following authorities in support of his position: 22 An. 23; 25 An. 225, 220; 26 An. 61.

Article 996 declares: "The case is different when such estates are

in the possession of the heirs either present or represented in the State, although all or some of those heirs be minors; for in such case the actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators if they be under age, or interdicted." C. P. 996.

It appears that the heirs have been recognized by a judgment of the Second District Court, and put in possession of the property. An "action for debt due from said succession must be brought before the ordinary tribunals against the heirs themselves, if they be of age, or against their tutor."

It is therefore ordered that the judgment of the lower court be set aside, and that the suit be dismissed for want of jurisdiction, with costs.

Rehearing refused.

No. 5629.

SUCCESSION OF WALTER O. WINN. On petition of JOHN S. MAYFIELD to destitute MARY E. RICHARDS, executrix.

John S. Mayfield, alleging that he is a creditor of the succession of Walter O. Winn, for reasons stated, prayed for the removal of the executrix from her trust. It appears from the testimony that in 1862 the executrix sold a portion of a certain plantation belonging to the succession by private sale. It also appears that she is not now a resident of the State, and that she has not given a power of attorney, duly recorded as required by law, to any one to represent her. These are sufficient grounds for destituting her of her trust.

A PPEAL from the parish court, parish of Rapides. *Sullivan, J. Thos. McCay, R. E. Hunter, Merrick, Race & Foster*, for plaintiff and appellant. *M. Ryan and J. G. White*, for defendant and appellee.

LUDELING, C. J. J. S. Mayfield, alleging that he is a creditor of the succession, for reasons stated, prayed for the removal of the executrix from her trust. The executrix alleged that Mayfield had no interest in the succession, and denied that he was a creditor thereof. There was judgment in favor of the defendant and plaintiff has appealed. A motion has been made to dismiss this appeal, on the ground that the judgment was rendered by consent. The judgment does not so state, and the entry on the minutes, relied upon by the appellee, does not support the position when taken as a whole. It recites that the exception was disposed of, and "by consent of parties the court proceeded to render the following judgment," that is, they consented that the court should render judgment on the merits immediately.

The motion to dismiss is refused.

It appears that the notes of Mayfield were acknowledged in November, 1865, since which time there has been no interruption of prescription. The notes were therefore prescribed when the first suit of Mayfield was filed, in 1873. Consequently, he has no interest or right to interfere in the affairs of the succession.

It is ordered that the judgment of the lower court be affirmed, with costs of appeal.

ON REHEARING.

MORGAN, J. On the motion to dismiss our opinion remains unchanged.

On the ninth of April, 1874, John Mayfield, alleging himself to be a creditor of the succession of Winn, brought suit in the parish court of Rapides to destitute her from her trust as executrix. The grounds upon which this action rests are: That in a former proceeding he was instructed by the court to institute proceedings to cause her to be removed; that the executrix has left the State without having left any one in charge of the estate under any recorded power of attorney; that she has had control of property exceeding in value half a million of dollars, and has never filed an account of her administration; that she has disposed by private sale, of the plantations belonging to the succession. He prayed for the appointment of a curator *ad hoc* to represent her, through whom, or personally, she might be cited, and that she be destituted as executrix.

M. Ryan was appointed to represent her. He was cited.

Ryan answered, denying that plaintiff is a creditor of the succession; that if he had ever been his debt was prescribed; that she has complied with all of her duties. He also excepted to the jurisdiction of the court *ratione materiæ*. Judgment was rendered in favor of the defendant.

As regards the claim of Mayfield it is supported by nine promissory notes of \$5000 each.

These notes are all dated thirtieth of March, 1860, and were payable on the tenth of November and tenth of December following. On the first of November, 1865, they were acknowledged by the executrix in writing, to be a debt of the succession of Winn.

On the tenth of May, 1870, John Mayfield took a rule upon the executrix in which these facts were related, and he asked that the executrix be ordered to file an account of her administration, and if she has not funds enough to pay him, that she be ordered to sell a sufficient amount of the succession property to pay him.

Service was made, in person, of this rule on the executrix on the eighteenth of May, 1870. This takes the case out of prescription.

Succession of Winn.

Upon the merits, it appears from the testimony of her attorney that in 1862 the executrix sold a portion of a certain plantation belonging to the succession by private sale. It also appears that she is not now a resident of the State, and that she has not given a power of attorney duly recorded as required by law, to any one to represent her. These are sufficient grounds for destituting her of her trust.

It is therefore ordered, adjudged and decreed that our former judgment rendered herein, in so far as it maintains the appeal remain undisturbed. It is further ordered, adjudged and decreed that our former judgment in so far as it affirms the judgment of the district court be avoided, annulled and set aside. And it is now ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and set aside, and that there be judgment in favor of the plaintiff, and against the defendant Mary E. Richards, late widow of Walter Winn, deceased, destituting her from the office of executrix of the last will and testament of the said Walter Winn, deceased, and that defendant pay the costs in both courts.

No. 5764.

THE STATE OF LOUISIANA v. GEORGE FRITZ *alias* FRY and FRANK O'BRIAN.

The provision of the statute under which Judge Atocha appointed a lawyer, George H. Braughn, to preside in his court and try defendants, being repugnant to article 90 of the constitution, was void from the beginning of its enactment and the appointment was a nullity.

The express requirement of article 90, that the judge shall select a lawyer to try a certain class of cases, carries with it an implied inhibition against the judge selecting or appointing a lawyer to act in his place and stead in the trial of any other cases.

The defendant was therefore tried and sentenced in the Superior Criminal Court during the absence of the judge of that court, and without any competent judge presiding at the time. The attorney who presided had no more authority to act as judge than any other person who was present at the trial.

The position that Braughn was a *de facto* judge and that his official acts were valid, is not tenable. He had no color of title to the office of judge of the Superior Criminal Court, and never claimed or pretended to be judge of that court.

APPPEAL from the Superior Criminal Court, parish of Orleans. *Braughn*, an attorney duly qualified, acting in the place of Judge Atocha. *A. P. Field*, Attorney General, for plaintiff and appellee. *J. J. Foley* and *M. A. Dooley*, for defendant and appellant.

WYLY, J. Defendant, Frank O'Brian, who was convicted on an information for: First, forging an order for the delivery of goods. Second, publishing as true a forged order for the delivery of goods, and sentenced to the penitentiary for four years, appeals from the judgment of the court below.

In this court his counsel files an assignment of errors, the most important objection being, that the accused was tried before George H. Braughn, Esq., an attorney at law, who presided under an appointment of Judge Atocha, the judge of said court; that the statute which authorized the judge to appoint an attorney at law to discharge the duties of his office during his inability to act on account of sickness, was unconstitutional, null and void, and the trial, conviction and sentence of this defendant were therefore null and void.

Article 90 of the constitution provides that: "In any case when the judge may be recused, and when he is not personally interested in the matters in contestation, he shall select a lawyer, having the qualifications for a judge of his court, to try such cases. And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case."

The express requirement of this article, that the judge shall select a lawyer to try a certain class of cases, carries with it an implied inhibition against the judge selecting or appointing a lawyer to act in his place and stead in the trial of any other cases; and what a judge is forbidden by the constitution to do, he can not be authorized to perform by an enactment of the General Assembly. The provision of the statute under which Judge Atocha appointed George H. Braughn, Esq., to preside in his court and try defendant, being repugnant to the constitution, was void from the beginning; and the appointment was a nullity.

The defendant was, therefore, tried, convicted and sentenced in the Superior Criminal Court, during the absence of the judge of that court, and without any competent judge presiding at the time. The attorney who presided had no more authority to act as judge than any other person who was present at the trial.

As to the position that George H. Braughn was a *de facto* judge, and therefore his official acts were valid, we will remark that he had no color of title to the office of judge of the Superior Criminal Court, held no commission from the Governor, and set up no adverse title to the office. Indeed he never claimed or pretended to be judge of that court. He recognized Judge Atocha as the judge of the court, and with his authorization attempted to perform the duties of that officer during his inability to act on account of sickness. The sole question therefore in the case is a question of authority of a judge to appoint an attorney to perform his official duties during his sickness, in view of the clause of the constitution quoted. And this question we think we have disposed of in the observations already made.

It is therefore ordered that the judgment appealed from be annulled, and that this case be remanded to be tried according to law.

State of Louisiana v. Coleman.

No. 5377.

STATE OF LOUISIANA v. EDWARD COLEMAN.

Where a witness declared that he had formed an impression based on newspaper statements and that said impression would give way to evidence, that is no cause for challenge.

The judge *a quo* properly rejected the following question to a witness: "You have stated that the accused received in his youth several injuries upon the head; you have stated also that his language and conduct were at times strange and extraordinary. Was that conduct and language that of a rational man?" The facts in regard to the language and conduct should have been detailed.

The following charge to the jury, which was objected to, is undoubtedly correct:

"The killing once proved, the burden of extenuation and of showing all circumstances of accident, misfortune or justification, are thrown upon the defendant. When insanity is pleaded in defense of a criminal act, it must be clearly shown that it existed at the time of the commission of the act. Every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jurors that the party was insane at the time of the commission of the offense. Drunkenness is no excuse for crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts."

The judge *a quo* did not err when refusing to charge the jury as follows:

"If the defense to an indictment is insanity, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the prisoner was sane when he committed the act, and if the jury entertain any doubts of his sanity, they must acquit him of guilt." The burden of proof is upon the party setting up the defense.

The judge *a quo* did not err when refusing to charge: "That, where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors."

The court below did not erroneously refuse, as alleged, to instruct the jury: "That, if some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible." The instruction was calculated to mislead the jury.

There is no error, as assigned, because the record fails to disclose "the names of the grand jurors by whom the indictment was found, the time and place at which the jury was formed, and whether the indictment was formed by twelve or more." In the record is found the following copy of the minutes of the court:

"The grand jurors duly empaneled and sworn in and for the body of the parish of Orleans appeared this day into court, and being called, retired to consider upon the business laid before them; they afterward returned into court and presented the following bill of indictment." This is sufficient.

There is no error, as assigned, because "the record fails to show that the defendant was asked if he had any thing to say why sentence of the law should not be pronounced on him." The remark in the decree, "and having nothing to offer in arrest of judgment," of course implies that the defendant was asked if he had anything to say why sentence of the law should not be pronounced on him.

It is unimportant and no error that the record fails to show "that the prisoner was present in court when the motion for a new trial was made and refused."

The objection that the court allowed the Attorney General, after announcing that the evidence in behalf of the State was closed, to offer another witness, is without weight. It was within the discretion of the judge.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Atocha, J. A. P. Field*, Attorney General, and *John McPhelin*, district attorney, for plaintiff and appellee. *Henry O. and John H. Castellanos, Braughn, Buck & Dinkelspiel*, for defendant and appellant.

WYLY, J. The defendant having been tried and convicted of murder and sentenced according to law, appeals from the judgment of the

court below. He assigns in this court certain errors, which we will notice in the order stated by him.

First—He alleges the court erred in refusing his challenge for cause when Louis Schwartz, one of the panel of jurors, was presented to him.

Schwartz, examined on his *voir dire*, stated that "he had formed an impression, based on newspaper statements, and that it would require evidence to change this impression." On cross-examination in regard to removing this impression he was asked "would it require considerable evidence." To which he answered: "I can not draw such a distinction. To me all evidence is evidence. It would require some evidence."

Questioned by the court, "You have stated that you had an impression, and you have also stated that it was not an opinion: now, sir, I want to know if that opinion will give way to evidence." He answered, "Yes." We think the court did not err in refusing the challenge for cause.

Second—He assigns the court erred in refusing the following question propounded to a witness: "You have stated that Coleman received in his youth severe injuries upon the head; you have stated also that his language and conduct were at times strange and extraordinary; was that conduct and language that of a rational man?" The opinion of the witness was properly rejected. Without detailing the facts in regard to the language and conduct of the accused, which witness thought strange and extraordinary, his opinion as to whether "that conduct and language was that of a rational man," was calculated to mislead the jury. Language and conduct which the witness might think were not that of a rational man, might not, if disclosed, produce the same conclusion with the jury.

Third—The objection set up in the third assignment is answered in our remarks in reply to the second.

Fourth—The fourth objection is to the following charge given by the judge to the jury: "The killing once proved, the burden of extension and of showing all circumstances of accident, misfortune or justification, are thrown upon the defendant;" that "when insanity is pleaded in defense of a criminal act it must be clearly shown to have existed at the time of the commission of the act;" and that "every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jurors that the party was insane at the time of the commission of the offense." And finally that "drunkenness is no excuse for crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts." This charge was undoubtedly correct.

Fifth—That the court erroneously refused to charge the jury as follows: "If the defense to an indictment is insanity, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the prisoner was sane when he committed the act; and if the jury entertain any doubts of his sanity, they must acquit him of guilt." The court did not err. The burden of proof is upon the party setting up the defense.

Sixth—The sixth objection is answered in our remark in reply to the fifth.

Seventh—The seventh objection is also answered in our remark in reply to the fifth. The party setting up the defense of insanity must establish it.

Eighth—Error is assigned because the court refused the following charge to the jury: "Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors." The court did not err. It had previously charged that "drunkenness is no excuse for crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts." This charge was a true exposition of the law, and the instruction refused was calculated to mislead the jury.

Ninth—The answer to the ninth objection is, as stated previously, the State is not bound to prove the sanity of the accused. He who alleges insanity as a defense must prove it.

Tenth—The tenth objection is answered in our remarks in reply to the previous objections.

Eleventh—Error is assigned because the court refused the following charge: "If some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible." The court did not err. The instruction was calculated to mislead the jury. To avoid responsibility for the offense it devolved upon the accused to prove the defense of insanity.

Twelfth—The answer to the twelfth objection is the same as that stated in reply to the eleventh.

Thirteenth—Error is assigned because the record fails to disclose the names of the grand jurors by whom the indictment was found, the time and place at which the grand jury was formed, and the indictment was found by twelve or more.

In the record is found the following copy of the minutes of court on April 30, 1874: "The grand jurors duly empaneled and sworn in and for the body of the parish of Orleans appeared this day into court, and

being called, retired to consider upon the business laid before them; they afterward returned into court and presented the following bill of indictment." It was signed by the foreman, and the record further shows that it was filed and recorded. There is no force in this objection.

Fourteenth—Error is assigned because the record fails to show that the defendant was asked if he had any thing to say why sentence of the law should not be pronounced on him. The remark in the decree "and having nothing to offer in arrest of judgment," of course implies that the defendant was asked if he had any thing to say why sentence of the law should not be pronounced on him.

Fifteenth—It is lastly assigned as error that the record fails to show that the prisoner was present in court when the motion for new trial was made and refused. This is unimportant.

The objection that the court allowed the Attorney General, after announcing that the evidence in behalf of the State was closed, to offer another witness, is without weight. It was within the discretion of the judge.

Judgment affirmed.

Rehearing refused.

No. 4110.

WIDOW P. C. LEMANE, Administratrix, v. HENRY LEMANE. IGNACE HALUM, Third Opponent.

Notice of subrogation to a judgment, served after the seizure thereof, has no effect to disturb rights acquired previously.

It was absurd for the succession of P. C. Lemane, having judgment for \$700 against Henry Lemane, to seize thereunder the judgment of the latter against the succession of P. C. Lemane, for \$500. At the time of the seizure the respective judgments were compensated. The law tolerates no such absurdity as a judgment creditor seizing a judgment against himself.

The objection that this court is without jurisdiction because the judgment seized and which the third opponent claims as subrogee, does not exceed five hundred dollars, is unfounded. At the time of the seizure the judgment and interest exceeded that sum.

APPPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. J. Duvincaud* and *A. L. Tissot*, for plaintiff and appellant. *R. G. Dugué*, for third opponent and appellee.

WYLY, J. In March, 1869, plaintiff, the legal representative of the succession of Pierre C. Lemane, sued the defendant, Henry Lemane, for seven hundred dollars, the price of a stall in the French Market, which he bought from his brother, Pierre C. Lemane, a few days before his death. Defendant pleaded a general denial, and also set up in reconvention a claim of five hundred dollars which he alleged he left on deposit in the hands of his brother a few days before his death.

Widow Lemane, Administratrix, v. Henry Lemane.

Before trial, however, defendant obtained judgment in the Second District Court on this five hundred dollar claim against the succession represented by plaintiff. At the trial of this case subsequently, plaintiff had judgment against defendant for the seven hundred dollars claimed as the price of the stall. Execution issued on this judgment, and the judgment of defendant in the Second District Court for five hundred dollars against succession of Pierre C. Lemane was seized.

Thereupon Ignace Halum filed a third opposition, claiming as subrogee the judgment seized.

The defense set up to this opposition was that no notice of the subrogation had been served, and compensation was pleaded. The court maintained the opposition, and from that judgment this appeal was taken.

The whole proceeding is quite irregular. As notice of the subrogation was only served on plaintiff after the seizure, it had no effect to disturb rights acquired previously. It was absurd for the succession of Pierre C. Lemane, having judgment for seven hundred dollars against Henry Lemane, to seize thereunder the judgment of the latter against the succession of Pierre C. Lemane for five hundred dollars.

At the time of the seizure the respective judgments were compensated. The law tolerates no such absurdity as a judgment creditor seizing a judgment against himself. The objection that this court is without jurisdiction because the judgment seized, and which the third opponent claims as subrogee does not exceed five hundred dollars, is unfounded, because at the time of the seizure the judgment and interest exceeded that sum.

It is therefore ordered that the judgment appealed from be annulled, and the demand of the opponent be rejected with costs.

No. 4078.

C. N. PRUDHOMME v. SALAMANDER FIRE INSURANCE COMPANY OF
NEW ORLEANS.

When there is in the description or designation of the buildings in which the goods insured are located, such misrepresentation of a material fact as to avoid the policy, the insurers are released from responsibility.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Jury trial. *E. H. McCaleb*, for plaintiff and appellee. *Albert Voorhies*, for defendant and appellant.

MORGAN, J. This is a suit on a policy of insurance. The instrument recites that, "in consideration of \$120 to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged," the Salamander Fire Insurance Company "do insure Ben

Toledano against loss or damage by fire to the amount of \$3000 on stock in trade, such as is usually kept in a country store, such as groceries, dry goods, hardware and cutlery, contained in a frame shingled store, situated in the town of Coushatta, Red River, Louisiana, being stock of C. N. Prudhomme." The defense is:

First—Want of insurable interest in the assured.

Second—That the defendants were not advised that the goods insured were kept for sale in a large hotel, used for the reception of travelers and sojourners, in which other avocations and trades were pursued by different parties, which fact, if it had been made known, would have deterred the defendants from accepting the risk.

If we give to the plaintiff what he claims as regards the insurance of the goods which were destroyed by the fire—that is, that they were his, and were insured for his benefit—still the second objection must prevail.

In the application to insure the goods are described as being in a store. Properly speaking, they were not in a store. They were contained in a room belonging to a lodging and boarding house. It was in the kitchen of this house that the fire which consumed the plaintiff's goods originated. By the terms of the policy "taverns" are extra hazardous. It is contended that the house in question was not a tavern but a hotel. The distinction between a tavern and a hotel in such a place as Coushatta is, it seems to us, a distinction without a difference.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

ON REHEARING.

HOWELL, J. A motion is made to dismiss this appeal on the ground that the appeal bond has been declared insufficient and the appeal dismissed by the court *a qua*. This has been disposed of in the prohibition suit, just decided, and hence the motion must be denied.

ON THE MERITS.

In our former opinion we held that the insurers were released from responsibility because the goods were in a building declared by the policy to be extra hazardous, and not in such a building as was described in the application for insurance and in the policy. We still think the insurers not liable under the circumstances; for whether the building be a tavern (the word used in the policy) or a hotel (by which it is designated in the record), there was such misrepresentation of a material fact as to avoid the policy—the premium for insurance in such buildings being higher than that paid by the insurer in this instance.

It is therefore ordered that our former decree remain undisturbed.

State ex rel. Pontchartrain Railroad Company v. Judge of Superior District Court.

No. 5827.

**STATE ex rel. PONTCHARTRAIN RAILROAD COMPANY v. JUDGE OF THE
SUPERIOR DISTRICT COURT et als.**

According to law a suspensive appeal is to be taken within ten days from the notification to the party cast of the judgment complained of. But the requirements of the law are not prohibitory, and it is understood by this court that any engagement not prohibited by law and not repugnant to good morals may be enforced between the parties thereto. The law does not say that the parties may not agree that the time for making an application for a suspensive appeal may not be extended, nor does it forbid the parties from fixing the amount of the appeal bond among themselves. The provisions of the law on the subject are for the protection of the parties in litigation. Either party may waive his rights to this protection, and if he chooses to do so and contracts to do so, his contract can be enforced.

The district judge has the power of pronouncing on the question whether an appeal is or shall be suspensive or devolutive, and of saying whether the appellee shall be entitled to take out execution, notwithstanding the appeal. But when it is a judgment which this court may reform, when the case is within its jurisdiction, it may determine that an appeal is suspensive, which the district judge may have decided was devolutive. In the like manner this court can decide whether the surety is good and solvent, and reverse the judgment of the lower court on this point.

Therefore, in this case, the application for a suspensive appeal, being made within the time agreed upon by the parties in interest and authorized to make the agreement, is valid.

APPPLICATION for a writ of prohibition against the judge of the Superior District Court, parish of Orleans. *J. A. Campbell, A. Micou*, for relator. *A. J. Lewis*, for Mrs. Ellen Murray et als., respondents. Judge *Hawkins*, respondent, in *propria persona*.

MORGAN, J. On the twenty-fifth of March, 1875, judgment was signed in the case of Ellen Murray, tutrix, etc., v. The Pontchartrain Railroad Company, in favor of the plaintiff, for ten thousand five hundred dollars and costs.

On the twenty-sixth of March plaintiff and defendant, through their respective counsel, agreed that the defendant's right to a suspensive appeal should be extended for the term of sixty days from that date. On the thirtieth of March this agreement was entered upon the minutes of the court, and granted.

On the twenty-fifth of May, 1875, defendants moved the court for a suspensive appeal from the judgment rendered on the twenty-fifth day of March preceding. The motion was granted on the same day, upon the condition that the defendant should furnish bond and security, conditioned as the law directs.

On the same day bond was furnished for \$16,050.

On the twenty-sixth of May, 1875, plaintiffs moved the court to set aside the appeal, in so far as it was suspensive, upon the grounds:

First—That the surety on the appeal bond is not good and solvent.

Second—That the amount of the appeal bond is insufficient.

Third—That by the agreement of the twenty-sixth of March, 1875, defendants had acquiesced in the judgment.

Fourth—That the legal delay for a suspensive appeal had expired.

Fifth—That the delay granted in the agreement of the twenty-sixth of March had expired previous to the filing of the motion for and bond of appeal.

Sixth—That the agreement is not binding upon plaintiff, as defendants have not complied with, but on the contrary have violated the letter and spirit of the agreement.

The district judge was of the opinion, as we gather from his answer:

First—That the surety on the appeal bond was not good and solvent.

Second—That the delay within which a suspensive appeal may be taken being fixed by law, it is a matter of public policy and is not susceptible of change by agreement between parties; that the delay fixed by law for the taking of a suspensive appeal had expired before defendant's appeal was asked for; and that the extension provided for in the agreement appeared to have been obtained for purposes different from those stipulated in the agreement, and were suggestive of fraud on the part of the appellant.

For these reasons the district judge declared that the appeal was devolutive only. Hence this application for a writ of prohibition.

Third—The question of acquiescence is not suggested either in the answer or in the brief of the defendant herein.

Our only concernment is, first, with the bond. Is it good in quality and amount? Second, was the appeal applied for in time to give it a suspensive effect?

First—The property of the surety on the bond is all personal property, but this is no objection. Estimating his property at its honest value we think he is worth, according to the testimony, at least \$35,000. His debts amount to about \$10,000. This would leave him solvent in the sum of \$25,000, or more than the amount of his liability.

Defendant in rule contends that the surety is not worth the amount which we have stated. But her objections are deductions, not facts. For instance, she says that much of his property is pledged to secure some \$8000 of debt, and that the entire amount pledged must be deducted from his assets. Not so. The property pledged is still his, and if it were sold to pay the debt for which it stands as security, the uncontradicted evidence is that it is worth the amount fixed by us. We are therefore justified in saying that it would fetch that amount. This would leave a balance which, added to the amount he has in hand, would be sufficient to pay the bond, should the judgment appealed from be affirmed.

She further contends that the surety is also surety on another bond for \$5000, and that this sum should be deducted from his assets. Giving her the benefit of this position—with regard to which, however, we express no opinion, still, according to the value which we think the

record discloses his property possesses, he has enough to pay both bonds should judgment go against him.

Is the bond sufficient in amount? The verdict was for \$10,500 and costs. The judgment followed the verdict. Should the judgment be affirmed, what amount will the defendants have to pay? Ten thousand and five hundred dollars, with the accrued costs.

The bond required to suspend the execution of a judgment is "for a sum exceeding by one-half the amount of such judgment." C. P. 575. One-half of \$10,500 is \$5,250. Therefore the bond required by law in this case would be \$15,750. The bond is for \$16,050, or \$300 more than the law requires, and leaving that sum for costs, if costs are to be included in the bond. In amount, therefore, the bond is sufficient.

Second—Was the appeal applied for in time to give it a suspensive effect?

Article 575 of the Code of Practice provides that if the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law, it shall stay execution and all further proceedings, until definitive judgment be rendered on the appeal; provided the appellant gives his obligation, with good and solvent security, residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one-half the amount for which the judgment was given, etc.

We have not been enlightened upon the question before us by the authorities cited from our own courts upon the subject before us. The rule, or rather the law which we have quoted above, is general, that a suspensive appeal must be applied for within ten days from the notification of the party cast of the judgment complained of. And this is what was decided in the *State v. Buchanan*, 13 L. 576, and many other cases.

But what we have to decide is, whether or no the requirements of the Code of Practice (575) are prohibitory? We do not think they are. And we understand the law to be that any engagement not prohibited by law, and not repugnant to good morals, may be enforced between the parties thereto.

Now, the article 575 of the Code of Practice says that the application for a suspensive appeal is to be made within ten days, but it does not say that parties may not agree that the time for making the application may not be extended; it provides that the bond to be furnished shall be one-half over the amount of the judgment, but it does not prohibit parties from fixing the amount of the bond among themselves. These provisions are made for the protection of the party in whose favor a judgment has been rendered, and for the purpose of giving to

the party cast an opportunity of taking the necessary steps for obtaining an appeal from a judgment which would otherwise become executory. Either party may waive his rights to this protection, and if he chooses to do so, and contracts to do so, his contract can be enforced.

The proposition advanced by the respondent that the district judge has the power of pronouncing on the question whether the appeal is or shall be suspensive or devolutive, and of saying whether the appellee shall be entitled to take out execution, notwithstanding the appeal, is supported by authority. *Stanton v. Parker*, 2 R. 551. We do not dispute it. But this is a judgment of the district court, which we may reform, when the case is within our jurisdiction, and we may determine that an appeal is suspensive which the district judge may have decided was devolutive.

So the lower court is competent to determine the sufficiency of the surety, and when the security is not good and solvent, a writ of prohibition will not issue restraining execution pending the appeal. 21 An. 178. Of course, when the security is not good a writ of prohibition will not issue. But it will issue if the surety is good and solvent, and whether he is good and solvent or not, we have the power to decide. Neither do we find any difficulty in adhering to the decision in the case of the *State v. Judge of the Fourth District Court*, 22 An. 115, which declares that where a bond is insufficient for a suspensive appeal, execution may issue pending the appeal. But the revolving question constantly recurs, was the bond insufficient? And this question it is our province and duty, when called upon, to decide.

Marcadé, the authority relied on by the respondent (*Marcadé, de la Prescription*, pp. 27, 28), is of the opinion that a renunciation of prescription, as regards the right of appeal, can not be enforced. He cites several authors in support of his position, as well as others who are opposed to him. If the question before us was whether or no a litigant, before judgment pronounced, could renounce the right of appeal, and we had no authority at hand, we would be obliged to consider the arguments of the respective commentators alluded to by him, and give our judgment where, in our opinion, the reasons were strongest.

But this is not the case before us. We are not considering whether a litigant has the right to renounce the right of appeal, either before or after judgment. We are simply called upon to say whether a party in whose favor a judgment has been rendered, can consent that the party against whom it is rendered shall have sixty days in which to make an application for a suspensive appeal, instead of the ten days stipulated by the Code of Practice. We think he may. Considering, therefore,

State ex rel. Pontchartrain Railroad Company v. Judge of Superior District Court.

First—That the surety on the appeal bond is good for the amount thereof;

Second—That the amount of the bond is sufficient;

Third—That the application for a suspensive appeal was made within the time agreed upon by the parties in interest, and that they were authorized to make the agreement.

It is therefore ordered that the rule herein issued be made peremptory.

Ludeling, C. J., concurring in the decree.

Howell, J., concurring in the decree.

No. 5662.

J. O. HOWELL v. SHERIFF OF EAST FELICIANA et als.

Plaintiff can not now be heard to contradict the allegations of his petition in regard to the ownership of the property in litigation, which he made in another controversy, nor can a witness be heard now to contradict the testimony which he then gave.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Dewing, J. D. C. Hardee, Cross & Pipkins, Rice & Whitaker*, for plaintiff and appellee. *W. F. Kernan & Lyons*, for defendants and appellants.

MORGAN, J. This is an injunction suit, instituted against the sheriff to restrain him from executing a writ which issued in the case of *Riley v. Howell*.

In that case (*Riley v. Howell*) we annulled the judgment on the ground of want of jurisdiction of the court which rendered it. If the judgment was a nullity, no execution could rightfully issue under it. The judgment of the district court, therefore, which maintained the injunction, is correct.

Judgment affirmed.

ON REHEARING.

WYLY, J. It now appearing that the court which rendered the judgments sought to be executed was not without jurisdiction, the merits of this injunction suit will have to be examined.

Plaintiff enjoined the seizure by defendants of an iron box and its contents, consisting of money, parish warrants, etc., on the ground that they were not his individual property and therefore not liable to seizure by his creditors; that they were in his custody and possession in his representative capacity of tax collector of the parish of East Feliciana, and that he had an interest in seeing that the property seized was faithfully applied to the purpose for which he had given bond.

 Howell v. Sheriff of East Feliciana et al.

In support of the position plaintiff sought to prove by himself and James A. Sullivan that the money, warrants, and other property seized belonged to the State or the parish. Defendants excepted to the evidence on the ground that in a recent controversy between plaintiff and one De Gray, who succeeded him as tax collector, plaintiff had judicially admitted that he was the owner of the property now under seizure, and the witness Sullivan in that case had testified that this property was the private property of plaintiff.

We think the bill of exceptions of defendants to the introduction of this evidence was well taken. Plaintiff can not now be heard to contradict the allegations of his petition in regard to the ownership of this property which he made in the controversy with De Gray; nor can the witness Sullivan be heard now to contradict the testimony which he then gave.

It is therefore ordered that the injunction herein be dissolved, with costs and one hundred dollars' damages.

Mr. Justice Howell was recused in this case.

 No. 5820.

STATE ex rel. JAMES WOOD v. JUDGE OF THE FIFTH DISTRICT COURT,
Parish of Orleans.

In a suit for dissolution, settlement and liquidation of partnership, the judge *a quo* having appointed a liquidator, one of the partners appealed from this interlocutory order. The case being called for trial on its merits, the appellant objected to its being tried pending the suspensive appeal from the order appointing a liquidator. The court *a quo* erred in sustaining the objection and in continuing the case.

APPPLICATION for a writ of mandamus against the judge of the Fifth District Court, parish of Orleans. *Bentinck Egan*, for relator. *Judge Cullom*, respondent, in *propria persona*.

TALIAFERRO, J. In a suit pending in the Fifth District Court by which one partner sued the other for a dissolution of the partnership and for settlement and liquidation of the partnership affairs, it seems that both the partners prayed the court to appoint a liquidator and each prayed for the appointment of himself. The judge appointed a third party. From this interlocutory order, Allen, one of the partners, appealed. When the case was called for trial on its merits, Allen objected to its being tried pending the suspensive appeal from the order appointing a liquidator. The court sustained the objection, and the case was continued.

The other party, Wood, the relator in this case, complains of the action of the judge *a quo* as being a denial of justice, and prays this

State ex rel. Wood v. Judge of the Fifth District Court.

court to issue a writ of mandamus ordering the judge of the Fifth District Court to have the said cause set for trial with preference and to proceed with the trial of the same with the least possible delay.

The judge in answer to the rule *nisi* says: If his appointment of a liquidator was correctly made, the report of the liquidator would become indispensably necessary as a basis for his judgment. If his appointment of a liquidator should be annulled on appeal he would be compelled from the intricate character of the accounts of the parties to refer them to an auditor; that the final decision of the cause by this court could not have been accelerated by hearing it at the time referred to by the relator.

We do not concur with the judge *a quo*, but think the case should have been proceeded with. Let the rule be made absolute.

No. 5839.

STATE ex rel. NICHOLAS SCHMIDT v. JUDGE OF THE SECOND JUDICIAL DISTRICT COURT, parish of Jefferson.

A party obtaining an injunction prohibiting a sheriff from executing a certain judgment, can not, after the injunction is dissolved and no appeal taken therefrom, appeal from a decree of the court making absolute a rule taken upon the sheriff to show cause why he should not put the purchaser in possession of the property sold in execution of the judgment, after the dissolving of the injunction. The plaintiff should have appealed from the judgment dissolving the injunction, if injured thereby. He can not appeal from an order which merely carries out a decree.

APPPLICATION for a mandamus against the judge of the Second Judicial District Court, parish of Jefferson. *Pardee, J. O. W. Besancon, Cotton & Levy*, for relator. Judge *Pardee*, in *propria persona*.

MORGAN, J. Schmidt obtained an injunction prohibiting the sheriff of the parish of Jefferson from executing a certain judgment. The injunction was dissolved. From this judgment no appeal was taken. The sheriff thereupon executed the judgment which had been enjoined, and sold certain property to satisfy the same.

The purchaser demanded to be placed in possession of the property purchased. The sheriff not complying, a rule was taken upon him to show cause why he should not do so. The rule was made absolute.

From the judgment on this rule Schmidt asked for an appeal, which was denied. He prays for an order commanding the district judge to grant his request.

The judge did not err. Relator should have appealed from the judgment dissolving his injunction, if he was injured thereby. He can not appeal from an order which merely carries out a decree.

Rule dismissed at relator's costs.

No. 5133.

CITY OF NEW ORLEANS V. HUGH CASSIDY.

A suit for taxes is summary and is not to be tried by a jury.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Samuel P. Blanco*, assistant city attorney, for plaintiff and appellee. *Geo. L. Bright*, for defendant and appellant.

HOWELL, J. We are not favored with a brief or argument on behalf of the appellant. There is in the record a bill of exceptions to the refusal of the judge *a quo* to grant a trial by jury on the ground that the suit, being for taxes, is summary and not to be tried by a jury. The ruling of the judge was correct. The law makes this class of cases summary in the mode of proceeding, and such are not to be submitted to juries. C. P. 756-57; 19 An. 82.

Judgment affirmed.

No. 6002.

STATE OF LOUISIANA ex rel. GEORGE C. NORCROSS v. JUDGE OF THE
FOURTH DISTRICT COURT, parish of Orleans.

There is nothing in the act creating the Superior District Court, which confines to that court the proceeding of relator, asking for an order to the sheriff to put relator in possession of certain real estate which he alleges to have purchased at a tax sale of the same by the tax collector under the provisions of act No. 47 of 1873, entitled an act to enforce the payment of taxes due the State, etc.

The Fourth District Court for the parish of Orleans is a district court in contemplation of the act No. 47, invoked by relator, being a district court of general civil jurisdiction.

The act does not declare in express terms that the order of the sheriff to put a purchaser in possession shall issue without notice, and this court may well construe it as adopted with reference to the general laws relating to summary proceedings in the courts of this State. Hence no constitutional question arises.

The judge *a quo*, in this instance, did not err in refusing to issue the order as prayed for, because no party was made to the proceeding upon whom notice could be served. Consequently there is no proper showing for the writ of mandamus to issue from this court.

APPPLICATION for a mandamus against the judge of the Fourth District Court, parish of Orleans. *G. H. Braughn*, for relator. *L. Madison Day*, for respondent. Judge *Lynch*, in *propria persona*.

HOWELL, J. This is an application for a mandamus to compel the judge of the Fourth District Court, for the parish of Orleans, to issue an order to the sheriff to put relator in possession of certain real estate which he alleges he purchased at a tax sale of the same, by the tax collector, under the provisions of act No. 47 of 1873, entitled "an act to enforce the payment of taxes due the State; providing for the seizure and sale of the property of delinquent taxpayers, and regulating the proceedings against them and their property and tenants."

The relator presented to the said judge a petition for such order as

prescribed by the last clause of the fourth section of said act, which is in the following words: "upon the presentation of a title so given (that is, a title by the tax collector) to the district court, it shall be the duty of the judge to order the sheriff to put such person in possession of the property so purchased by him."

The judge refused to grant the order for the reasons:

First—The Fourth District Court is without jurisdiction.

Second—He questioned if there is any law which will warrant this summary proceeding.

In answer to the provisional writ of mandamus he contends that the subject matter, if constitutional, is confined to the jurisdiction of the Superior District Court, in the parish of Orleans, by section two of act No. 2 of 1873, creating the said court, and that the act under which the said order was asked is unconstitutional in several respects and especially in depriving an owner of his property without a hearing.

We can find nothing in the act creating the Superior District Court, which confines this proceeding to the said court, and we think the Fourth District Court, for the parish of Orleans, is a district court in contemplation of the act No. 47, invoked by relator, being a district court of general civil jurisdiction.

It is unnecessary to raise or discuss the constitutional question, as the act does not declare in express terms that the order to the sheriff, to put a purchaser in possession, shall issue without notice, and we may well construe it as adopted with reference to the general laws relating to summary proceedings in the courts of the State and as authorizing the district courts, to which application is to be made, to require the necessary legal notice to be issued to the party to be ousted and to dispose of the contest in a summary manner.

We think, however, that the judge in this instance did not err in refusing to issue the order as prayed for, because no party was made to the proceeding upon whom notice could be served, consequently there is no proper showing for the writ of mandamus to issue from this court. When the judge refuses to issue the order upon presentation to him of a petition in proper form, it will be time to ask for a mandamus.

It is therefore ordered that the writ of mandamus herein be discharged with costs.

MORGAN, J., *dissenting*. I think the law makes it the duty of the district judge to pass judicially upon the question propounded to him, and having refused, I think he should be ordered to do so.

I think the mandamus should be made peremptory.

No. 5294.

GEORGIANA WHAN v. JESSE R. IRWIN, Tutor, et al.

This is a suit, by rule, to compel a surety on an appeal bond to pay the remainder of the judgment, which had been affirmed on a suspensive appeal from an order of seizure and sale.

If the position taken be correct, that the proceeding against the surety was premature, as only the mortgaged property had been sold under the writ, and no execution had been issued against the judgment debtor and returned *nulla bona*, then to require bond for an appeal from an order of sale is an idle form.

Article 575 of the Code of Practice and section 37 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued, was issued, and returned not satisfied. The requirements of the law were substantially complied with. The surety knew that, under the executory process, no other property could be sold except that which was included in the mortgage, and when he stopped that by signing the appeal bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

By reason of the nature of the judgment, no execution could be taken out, after the return of the order of seizure and sale, which could reach the property of the debtor, and therefore plaintiff had the right to proceed immediately against the surety on the appeal bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Lyman Harding, Samuel P. Blanc, H. G. Morgan*, for plaintiff and appellant. *Bentinck Egan, J. Livingston*, for defendant and appellee.

WYLY, J. The order of seizure and sale in this case having been affirmed on appeal, with ten per cent. damages, plaintiff caused execution to issue and the mortgaged property was sold, leaving a balance still due by the defendant. The plaintiff then took a rule on Robert Bloomer, surety on the suspensive appeal bond, to compel him to pay the balance due after the enforcement of the executory proceeding.

The court dismissed the proceeding by rule, on the ground that, as plaintiff had no personal judgment against the principal on the appeal bond, no execution had or could issue against him, and until all legal means are exhausted against the principal, his surety can not be made liable. The correctness of this doctrine can not be doubted. 9 La. 229; 10 Rob. 136, 191; C. P. 596.

The plaintiff, however, contends that as the principal on the appeal bond, Jesse R. Irwin, tutor, has no property belonging to the tutorship, it would be a vain thing to proceed against him, and therefore this proceeding can be maintained under the cases 1 An. 122, 11 An. 124, 20 An. 512, 25 An. 124. The difficulty is, there is no proof in the record showing that the tutorship is insolvent or without means to pay the debt for which the defendant is the judicial security. The facts disclosed in the record do not justify the legal conclusion.

Judgment affirmed.

ON REHEARING.

LUDELING, C. J. This is a suit, by rule, to compel a surety on an appeal bond to pay the remainder of the judgment, which had been affirmed on appeal. The said appeal was from an order of seizure and sale. It is contended that the proceeding against the surety was premature, as only the property mortgaged had been sold under the writ and no execution had been issued against the judgment debtor and returned *nulla bona*. If this proposition be correct, to require a bond for an appeal from an order of seizure and sale is an idle form, for having exhausted his remedy under the executory process, the creditor would have to sue the debtor; and if he appealed from the personal judgment against him, a new appeal bond would have to be given and the surety on that appeal bond would have to answer for the payment of the personal judgment rendered on appeal, if the debtor had not property sufficient to satisfy said judgment. The surety on the appeal bond, given for the appeal from the order of seizure and sale, would not be a party to the second proceeding.

But it has been decided by this court that to suspend the execution of an order of seizure and sale, by appeal, a bond must be given in conformity with the requirements of article 575 of the Code of Practice. 20 An. 179; 22 An. 36. Article 575 of the Code of Practice requires the appellant to "give his obligation, with a good and solvent security, residing in the jurisdiction of the court, in favor of the appellee, for a sum exceeding by one-half the amount for which the judgment was given, if the same be for a specific sum, as surety for the payment of the amount of such judgment, in case the same be affirmed," etc.

Section thirty-seven of the Revised Statutes of 1870 declares, "In all cases of appeal to the Supreme Court, or other tribunals in this State, if the judgment appealed from be affirmed, the plaintiff may, on return of the execution that no property has been found, obtain a decree against the surety on the appeal bond for the amount of the judgment, on motion, after ten days' notice, which motion shall be tried summarily and without the intervention of a jury, unless the surety shall allege, under oath, that the signature to the bond purporting to be his signature is not genuine, or that the judgment has been satisfied."

The only execution which it was possible for the judgment creditor to cause to be issued, was issued and returned not satisfied. The requirements of the law were substantially complied with in this case. The surety knew that under the executory process no other property could be sold except that which was included in the mortgage, and when he stopped that writ by signing the appeal bond he obligated

himself to pay the amount of such judgment for which the writ had issued, if affirmed on appeal.

If it be true that the surety can not be proceeded against in this case, because the proceeding is *in rem*, it would be equally true as to sureties on appeal bonds in cases of attachments, where the absentees made no personal appearance. A construction of the laws which leads to such conclusions can not be correct. In *Alley v. Hawthorne* this court said: "But, as in the present case, suppose an execution can not be lawfully taken out against the property of the debtor—suppose he has made a *cessio bonorum*, or has died and his succession is under administration, will the law turn the judgment creditor over to a labyrinth of creditors, to await the tardy litigation of a litigated or insolvent succession? Is this the security to which he is to be referred on having his rights finally adjudicated upon, after a delay which the surety has enabled the debtor to obtain? If it be so, the judicial suretyship is a mere solemn farce, the commencement rather than the end of litigation, and the provision of the law for the satisfaction of the debt is a mere mockery, not worth having, and would often be attended with more vexation, expense and delay than the pursuit of the debt itself. We think that, if the creditor can not take out his execution on the judgment by reason of a change in the condition of the debtor's estate, which prevents its being reached by that process, the law requires from him no act in order to secure his immediate recourse against the surety on an appeal bond, and that we can require none." 1 An. 126. The reasons given in that case are applicable to the present case.

By reason of the nature of the judgment, no execution could be taken out after the return of the order of seizure and sale which could reach the property of the debtor, and therefore he had the right to proceed immediately against the surety on the appeal bond. It is therefore ordered that our former decree in this case be set aside; that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiff against Robert Bloomer for the sum of \$4,666 94 and costs of both courts.

WYLY, J., *dissenting*. Article 594 of the Code of Practice provides, that from the moment citation of appeal is served on the appellee, the appellant can not withdraw the appeal, etc. Article 595 provides that appellant may withdraw his appeal, on motion in the lower court, before the appellee has been cited, and in such case he may renew the appeal within the time allowed for taking an appeal. Article 596 says: "If, on the execution of the judgment of the appellate court,

there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant; provided, that no suit shall be instituted against such security, until the necessary steps shall have been taken to enforce payment against the principal." And the language of article 597 is: "The rules provided in the preceding articles shall govern all appeals to the Supreme Court, whether the same be taken from judgments rendered by district courts or parish courts."

Now, if the rule stated in article 596 is to govern or shall apply to all appeals to the Supreme Court, are we not bound, by the express command of the lawgiver, to apply it to this case, where a surety is sued and sought to be made liable on an appeal bond?

Article 596 must apply to this suit upon a suspensive appeal bond from an order of seizure and sale, because, in precise terms, article 597 declares it shall apply to all appeals to the Supreme Court. The article is clear and free from ambiguity. There is no room for construction, or for an argument supporting the views of the majority of the court, based upon convenience and the equitable rights of the parties. The rights of the parties have been fixed in precise terms by the law, and this we must administer to them as we find it.

By article 596, which I have quoted and which I regard as the law of the case, the appellee may obtain judgment against the surety on the appeal bond, if, "on executing the judgment of the appellate court, there is not sufficient property of the appellant to satisfy the judgment and costs;" "provided that no suit shall be instituted against such security, until the necessary steps shall have been taken to enforce payment against the principal."

Here the appellee has executed the order of seizure and sale, affirmed by the Supreme Court, and there was not sufficient property of the appellant (embraced in the mortgage) to satisfy the judgment and costs. And without taking necessary steps to enforce the payment of the balance of the debt against the principal, the appellee rushes into court with a rule and proposes to take judgment against the surety.

Appellee has complied with one clause of article 596; she has enforced the order of seizure and sale against the mortgaged property of the appellant and found it insufficient to pay the judgment and costs, but she has in no sense complied with the other clause of that article contained in the proviso, which is: "That no suit shall be instituted against such security until the necessary steps shall have been taken to enforce payment against the principal."

Now, I take it that this proviso is a most important part of the article; it was not thrown in as a high sounding and meaningless clause, in order to round off the article.

Appellee has complied with one clause and ignored the other; and in this, it seems to me, she has been sustained by the majority of the court.

I can not see how the appellee has complied with the proviso, the condition precedent to suing the security. How has she taken "the necessary steps to enforce payment against the principal?" Has she sued the principal? She has not. Has she shown the insolvency of the principal and, therefore, her right to be exonerated from suing him, because the law does not require a vain thing? There is no proof in the record showing the insolvency of the principal.

In my opinion the clause "necessary steps to enforce payment against the principal," means necessary legal steps; a suit, judgment and an attempt to make the money on execution. This the appellee has not attempted to do. She asks to be excused from complying with the law (the proviso of article 596), on the ground that it would be inconvenient, that great delay might occur in suing the principal, because he might take an appeal, etc. To this my reply is, that an argument of inconvenience or hardship accruing to the appellee can not be opposed to or be made to override an express provision of law.

Besides the rule of practice stated in article 596 of the Code of Practice, which plaintiff has failed to comply with, I find the same requirement in article 3066 of the Revised Code, under the title of suretyship. That article declares that: "A judicial surety can not demand the discussion of the property of the principal debtor. But no suit shall be instituted against any surety on an appeal bond, nor on the bond of any administrator, tutor, curator, executor or syndic, until the necessary steps have been taken to enforce payment against the principal." Have the necessary legal steps been taken to enforce payment against the principal, in the case at bar? They have not. Then by the express terms of the prohibitory law quoted, plaintiff can not sue the defendant representing the surety on the appeal bond.

I also object to the conclusion of my learned associates, because in my opinion, it, in effect, makes the condition of the surety on a suspensive appeal bond in an order of seizure and sale more onerous than that of the principal, thereby subverting an important principle of the law of suretyship and the express provision of article 3037 of the Revised Code.

For the payment of the balance due after exhausting the mortgaged property, the principal is only suable by the appellee in a personal action; he must be cited and be permitted to enjoy all the delays of an ordinary suit. The surety, however, is not thus favored; he is proceeded against summarily by rule; he is not cited; he can not enjoy the delays accorded to the principal. The money may be made speed-

ily of him ; but no summary remedy is given by which he can recover from the principal that which he has been compelled to pay on his account. I am slow to believe that the lawgiver gives the creditor a more summary remedy against the surety than he has against the principal. It looks to me like changing the position of the surety and principal, or making the position of the former more onerous than the latter.

The question was never presented to this court before. It is an important one. If the conclusion of the majority of the court is adhered to as the true exposition of the law, the result will be, that after the mortgaged property has been sold on an order of seizure and sale that has been affirmed on appeal, no appellee will hereafter sue the appellant for the balance due him ; he will proceed at once by rule against the surety on the appeal bond, and leave the latter to make the money as best he can from the principal debtor.

In view of article 596 of the Code of Practice, and also the express provision of article 3066 of the Revised Civil Code, I adhere to the opinion expressed in our former decision of this case, that the surety can not be made liable until all legal means have been exhausted against the principal.

When judgment has been recovered against the principal for the balance due to the plaintiff and the money can not be made on execution, a rule will lie and the surety can be made liable, but not till then, unless by insolvency it would become useless to sue the principal.

If the principal should appeal, as in the case supposed by counsel for plaintiff, and another suspensive appeal bond were given, the result would be, according to my view of the law, the appellee would have recourse against the surety on each of the bonds for the payment of the debt, if the principal could not be made to pay after taking necessary legal steps. But if the money could be made on execution out of the principal, neither of the sureties on the two bonds would be liable.

Much stress is laid on the case of *Alley v. Hawthorn*, 1 An. 122, which decides: that the creditor is not bound to discuss the whole estate of the principal. He is in no case bound to do more than take out an execution, and where, in consequence of a change in the condition of the estate of the principal, it can not be reached by that process, no act is required on the part of the creditor to secure his immediate recourse against the surety. I entirely concur in the soundness of that decision ; but I fail to perceive its application to this case.

Unless by a stretch of fancy it should be supposed that a change has happened in the condition of the principal, so as to put his prop-

erty beyond the reach of execution, when the mortgaged property has been sold and the executory process can not be directed toward other property of the principal. This is a mere falacy. Executory process exhausted against the mortgaged property, can not for the balance due the creditor, be directed against the other property of the principal, if he were a millionaire. The wealth, solvency or pecuniary condition of the principal is a matter of total indifference. The residue of the money can not be made on execution, after the sale of the mortgaged property, not on account of any change of condition of the principal, but solely because the law does not allow an execution to issue for the balance due after exhausting the mortgage, until a judgment has been rendered for such balance. In the case at bar the money can not now be made on execution because there is no judgment against the principal.

The insolvency or change of condition of the principal is not in this case.

Here the sole question is, can the surety on a suspensive appeal bond in an order of seizure and sale, be proceeded against by rule for the balance due after exhausting the mortgage, where no personal judgment has been rendered against the principal for said balance, and where it is not shown that a change has happened in the condition of said principal so that the money can not be made on execution against him.

For the reasons stated and those given in the first opinion of this court in this case, I dissent.

HOWELL, J., *dissenting*. I concur in the dissenting opinion of Mr Justice Wyly as to the right to proceed against the surety on the appeal bond as was done in this case.

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No. 3500.

WILLIAM MCCUBBIN, Tutor, v. SAMUEL HASTINGS.

This suit is instituted by the husband of the deceased and the father of her child, a minor, against the defendant, a druggist, to make him responsible in damages for the death of this woman, the allegation being that the prescription was improperly compounded. The damages are claimed in his name and that of his child. His damages, if he is entitled to any, is the amount expended by him for medical and other services subsequent to the giving of the noxious enema and for the funeral expenses. The right to damages on the part of the child is that which he inherits from his mother.

The defendant's exception to plaintiff's demand, on the ground that the petition disclosed no cause of action, was a peremptory one and could be pleaded at any time during the progress of the trial. The grounds on which the exception rested were, that it was not alleged that the damage complained of was suffered through the *fault* of the defendant, and such allegation is necessary before that *fault* could be proved; and also, because plaintiff did not state that defendant, as employer, might have prevented the act which caused the damage, and did not do it.

Defendant excepted to the order allowing plaintiff to amend on the aforesaid points. The exception can not be maintained. Amendments are always allowed in the discretion of the court.

The demand is the test to interrupt prescription, and not the sufficiency of the allegations which support it.

If the allegations were sufficient to imply fault on the part of defendant, the use of the very word itself was not necessary to fix the responsibility on defendant. If he could have prevented the act, as is alleged, and did not, he was necessarily in fault.

The clause in which plaintiff, as tutor of the minor, claimed ten thousand dollars damages suffered by said minor personally, in the loss and deprivation of the care, education, assistance and love of his mother was, on motion, properly struck out by the judge *a quo*.

The action, so far as the minor is concerned, is the right of action which his mother had against the defendant for the suffering that was caused her by the defendant's employe, and which he inherited. He has no claim against him for the loss which he suffered through his mother's death.

The judge *a quo* erred in striking out the clause in which plaintiff, in his individual capacity and on his own behalf, claims damages for actual expenses, loss of the assistance and services of his wife in business, and for personal sufferings in mind for the loss of his wife, caused by said criminal mistake. Defendant is responsible for all the expense and damage which plaintiff suffered subsequent to the giving of the enema.

Defendant's objection on the ground that the certificate of death given by the physician states that the woman died of yellow fever, and that the plaintiff caused it to be published in the newspapers, is not well founded. In so far as the certificate is concerned, that was no act of the plaintiff's. As regards the notice, she might have died of the yellow fever, and still her death from that disease might have been caused by the enema. Although very ill, the deceased had at least one chance for her life, which was taken away by the fatal ministering of a violent substance.

Although absent from the city, the defendant was nevertheless responsible for the act of his servant. Admitting the competency of the servant, the responsibility of the employer would be none the less.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Hornor & Benedict, F. W. Baker, Cotton & Levy*, for plaintiff and appellant. *James McConnell*, for defendant and appellee.

MORGAN, J. On Monday the twenty-sixth August, 1867, the wife of William McCubbin was attacked with yellow fever. A physician was immediately called in, and the patient was placed under the charge of a nurse.

On the Wednesday following she was quiet. About one o'clock of that day the physician ordered her an enema. We are satisfied from

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the evidence that the enema as ordered was to have been composed as follows: Sulphate of quinine thirty grains, mucilage of gum arabic four ounces, *camphor water* four ounces, Batley's sedative solution, thirty or sixty drops, to be administered one-half as soon as received, the other in an hour after. We ascertain the component parts of the prescription from the testimony of the physician, as the prescription itself could not be found in the defendant's shop where it should have been kept. The prescription was ordered by the physician to be compounded at the defendant's shop. The husband of the deceased took it there. He handed it to an employe. After it was compounded he purchased an injection pipe, paid for both, and left. He gave them to the nurse. She administered a portion of it. The effect seems to have been instantaneous. It threw the unfortunate woman into spasms and convulsions, causing her to purge and vomit at the same time. The attending physician was immediately sent for. He could not be found, and only reached his patient late at night. He did all that his science allowed him to do for her relief. He called in another physician. Their efforts were fruitless. Two days after the patient died.

This suit is instituted by the husband of the deceased and the father of her child, a minor, against the defendant to make him responsible in damages for the death of this woman, the allegation being that the prescription was improperly compounded.

The evidence leaves no doubt on our mind that spirits of camphor was substituted for camphor water; that the sufferings of the woman, which are shown to have been intense, were caused by this mistake, camphor water being a very innocent preparation; spirits of camphor being a decoction of camphor and alcohol; and that it contributed to a large extent, if it did not absolutely cause the death of the patient.

The prescription was not compounded by the defendant. At the time it was put up he was not in the city. The clerk had not been employed by him. His services had been engaged by his brother. The defendant is none the less responsible for his acts. The employment was authorized, and his responsibility for the acts of his employes can not be disputed.

The case was twice tried before a jury in the Fifth District Court. It was then, by consent, remanded to the Fourth District Court and submitted to the judge alone. He decided in favor of the defendant, and the plaintiff has appealed.

In his own name plaintiff claims damages for the necessary expenses incurred by him consequent upon the death of his wife, for the loss of time it occasioned him, from the loss of his wife's services, and for the wrongs inflicted upon his feelings.

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As tutor to his minor child he claims that, from the agonies endured by his wife she suffered heavy damages, and that her right of action therefor has been transmitted to her heir, and that her death, which he lays at the defendant's door, having deprived the child of a mother's care, he is responsible in damages on that account. The aggregate amount claimed from the defendant is \$35,000.

His damages, if he is entitled to any, is the amount expended by him for medical and other services subsequent to the giving of the enema, and for the funeral expenses.

The right to damages on the part of the child is that which he inherits from his mother.

The defendant filed a peremptory exception to plaintiff's demand, on the ground that the petition disclosed no cause of action. This exception was filed after the jury had been impaneled. The grounds upon which it rests are, first, "because it is not alleged that the damage complained of was suffered through the *fault* of the defendant, and it is necessary it should be alleged to be the defendant's fault before that fact could be proved," and second, "because it (the petition) does not state that the defendant, as employer, might have prevented the act which caused the damage, and did not do it." The exception was sustained, but the plaintiff was allowed to amend. Plaintiff excepted to the ruling of the court which maintained the exception. Defendant excepted to the order allowing plaintiff to amend. Both rulings were correct. The exception was a peremptory one and could be pleaded at any time during the progress of the trial. Amendments are always allowed in the discretion of the court.

After the amendment was made, defendant then pleaded the prescription of one year. The plea was properly overruled. The demand was made within the year of the alleged tort. The demand is the test, and not the sufficiency of the allegations which support it.

But the defendant still contends that the amended petition is defective, because it does not allege that he was in fault. The allegations are, that the death of the deceased was caused by the negligence of the defendant's clerk, and that he, the defendant, might have prevented the act complained of, but did not do so. If the act which caused the damage was done by the defendant's clerk, and the defendant be responsible therefor, and the defendant could have prevented it, but did not, then clearly it was by the fault of the defendant that the damage occurred, and the use of the word *fault* was not a necessary allegation to fix the responsibility upon him. If he could have prevented the act, and did not, he was necessarily in fault.

On the trial the defendant moved to strike out the second and third causes of action as stated in the petition, which were :

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Second—"Also, as tutor of his minor, for ten thousand dollars damages, suffered by the minor, personally, in the loss and deprivation of the care, education, assistance and love of his mother."

Third—"In his individual capacity, and in his own behalf, for five thousand dollars damages, for actual expenses, loss of the assistance and services of his wife in business, and for personal sufferings in mind for the loss of his wife, all caused by said criminal mistake."

The judge ordered them stricken out. As regards the second, his ruling was correct. The action, in so far as the minor is concerned, is the right of action which his mother had against the defendant for the suffering which was caused her by the defendant's employe, and which he inherited. He has no claim against him for the loss which he suffered through his mother's death. With regard to the third objection, the court erred. Defendant is responsible to the plaintiff for all the expense and damage which he suffered subsequent to the giving of the enema.

The first objection which the defendant raises to the plaintiff's demand on the merits is, that the certificate of death, given by the physician, states that she died of yellow fever, and that the plaintiff caused it to be published in the newspapers that she died of yellow fever.

In so far as the certificate is concerned that was no act of the plaintiff's. As regards the notice, she might have died of yellow fever and still her death from that disease might have been caused by the enema. If a pistol had been fired into some fleshy part of her body while she was laboring under an attack of fever, the ball itself might not have produced death, but the shock by aggravating the fever probably would. Under these circumstances she would have died of yellow fever, but her death would have been superinduced by the shot. So in this case. The deceased was suffering under an attack of yellow fever. It was a violent attack. Quiet and repose were of all things most necessary to her safety. She was dangerously ill, it is true. But she had at least one chance for her life, and the injecting of this violent and exciting substance into a particularly sensitive portion of her body, took, in our opinion, from the unfortunate woman the one chance which was left to her. She died, it is true, from yellow fever, but it was the enema which made the fever result fatally.

The next ground of defense is, that defendant can not be condemned, unless the plaintiff proves that he was some way in fault, and that he really might have prevented the act which caused the damage. In one sense it was impossible for him to have prevented the calamity, because he was not in the city. But, if a master is only to be held responsible for the act of his servant when he might have prevented the act and did not, there would be no responsibility in the principal,

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except for such acts as were done in his presence. If this were the law, if the driver of a carriage owned by the keeper of a public stable, wantonly ran into and destroyed the carriage of another, the owner of the public carriage would not be held responsible for the damage caused by his servant, because it was no fault of his that the other carriage was run into. If a man is run over by a careless car driver, the company in whose employ the driver is, can not be held responsible, because it was not the company's fault. But we know that this has never been considered law, and that where injuries have occurred as the result of carelessness on the part of the employes of such parties, the principals have been made to respond in damages. He further attempts to exculpate himself, from the fact that the clerk who compounded the prescription was reputed to be a competent druggist. To a certain extent he has established this: that is to say, he has produced a number of witnesses who testify in that direction. But there is one recommendation which he did not have, and that was a diploma. It is not pretended that he was a graduate in pharmacy from any medical institute.

It may, however, be assumed that he was competent. The defendant's liability would be none the less certain. The defendant is himself represented as being a most competent druggist. If he had made the mistake, would his proficiency in his calling shield him? or would it not rather aggravate the fault? Incompetency and carelessness—and such mistakes, arise from one or the other of these causes—result in the same way. Either or both produce suffering and sometimes death. And can it be that if a physician should prescribe for his slightly ailing patient a small quantity of calomel and soda, and the druggist were to substitute arsenic for soda, that he could shield himself from the consequences which might result, by saying, if the prescription was compounded by himself, that it was a mistake, and if the act of his servant that he could not have prevented it? The law does not place a community in the position of being poisoned by mistakes, with no one to be held responsible therefor. If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment.

The last serious defense set up is, that the enema did the patient no harm. Many physicians were examined upon this point, and counsel for defendant, in the very able brief which he furnished us, says: "With surprising unanimity, these physicians, every one of whom have had large experience in the treatment of yellow fever, declared the effect would have been beneficial rather than injurious."

As we have said before, Mrs. McCubbin was taken ill on Monday,

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the twenty-sixth of August. On the Wednesday following the enema was administered. Up to this time the patient had been quiet. The nurse says that, turning into the third day the fever began to abate and the physician said he found her much better; that he was going to order a mixture which would act like a charm, as she was not sweating freely enough. The enema came, and this is how the nurse, who administered it, describes its effects: "As soon as I gave it to her she commenced to complain; she said, 'Oh nurse! don't give me any more, for God's sake! it will kill me.' I suppose I gave her one-third of it; she was complaining all the time. I set the cup down on the bed and called McCubbin (who had left the room at his wife's request when the nurse was about to administer the enema) and told him the injection made her very ill. It made her that ill it threw her into spasms. She commenced throwing up and purging down, and was in great agony, but got easier afterwards."

McCubbin swears that, when he got up stairs, his wife was straightened out and almost black in the face, and apparently in spasms or a fit. He says: "I put my hands underneath her to raise her from the bed; she worked in the spasms about three minutes, and in her spasms both purged and vomited at the same moment, which seemed to give her some ease. 'Oh my God, Will,' she said, 'what have you given me? I am all on fire! I am burning!' And so she kept on. You could hear her until ten o'clock at night a block off, and she had never made a moan before."

The attending physician was sent for immediately. It was a season of calamity. The physician was in full practice, and, hurrying as he was, from patient to patient, could not be found. Late in the night he came of his own accord. Discovering her condition, he immediately denounced the mistake which had been made; said to several who were present, and at various times, that the injection had injured her; took the bottle himself to the druggist to see whether, per chance, he had made the mistake in writing out the formula, and is shown to have said that, but for the injection, his patient would have done well. He did all in his power to remedy the evil which had been done. Nothing that was tried for her relief succeeded. She sank gradually from the time the enema was administered until three days afterward, when she died.

When scientific gentlemen undertake to tell us, under such a state of facts, that the enema, as administered, was a benefit to the patient instead of an injury; that a substance as powerful as alcohol, in which camphor, a violent stimulant, has been dissolved, can be injected into one of the tenderest parts of the human frame, when the patient is suffering from a severe attack of such a disease as the yellow fever is,

without doing any harm, but, on the contrary, doing good, we see in our mind's eye the unfortunate victim upon whom the experiment has been tried, as she is described by the witnesses, writhing in agony, dying, dead, and we say that that dreadful fact alone destroys all their theories; and we think that he who, by himself or those for whose acts he is responsible, caused this agony, not to say death, should be made to answer for the suffering which he caused.

As regards the damages, the plaintiff has not shown what he expended, and therefore we can give him no judgment. As to the minor child, we think he should receive twenty-five hundred dollars,

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiff, William McCubbin, in his capacity as tutor to his minor child, William James McCubbin, and against the defendant, in the sum of twenty-five hundred dollars, with legal interest from judicial demand, and costs of suit in both courts.

WYLY, J., *dissenting*. The physicians who testified in this case all agreed that if the mistake had occurred in filling the prescription, and spirits of camphor instead of camphor water had been used, it would have improved the prescription and the result would have been beneficial instead of injurious to the patient. The opinion of experts is evidence. And according to this evidence, no injury resulted from the alleged mistake of defendant's clerk. The case should be decided according to the evidence in the record, and from it it appears no damage was done. Besides, the proof fails to establish with legal certainty the fact that a mistake occurred. Both a mistake and an injury must be shown in order to recover. I dissent in this case.

Rehearing refused.

No. 2931.

TABARY & AMORY v. T. F. THIENEMAN.

The question in this case is, whether the defendant had a right to dispose of a certain lot of cotton which he had sold to plaintiffs and which plaintiffs failed to receive, to have weighed, and to pay for, within a reasonable time and according to practice and the custom of trade prevailing in New Orleans, which allows only a delay of three to five days at the utmost for doing what is necessary to compel the execution of the contract.

It appearing, under the circumstances of the case, that the seller was sedulous, if not importunate, in his endeavors to close the sale, and that he extended to its utmost limits, the period usual after a sale for receiving and paying, and it appearing also, on the other hand, that the buyers continued tardy and inactive until the sixth of January about receiving, and paying for the cotton which they had purchased on the twenty-ninth of December preceding, and until defendant's patience, as he expresses it, "was at an end," it results that plaintiffs have no right to recover what they claim to be due to them by defendants.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux, Fenner & Hall*, for plaintiffs and appellants. *E. Bermudes* and *O. F. Olaiborne*, for defendant and appellee.

TALIAFERRO, J. The plaintiffs sue the defendant for twenty-five bales of cotton which they allege they purchased from him and which he has failed to deliver in pursuance of the contract. They claim damages also for the non-performance of the engagement on his part. The cotton sued for was sequestered and afterwards released under bond and sold by the defendant. Subsequently, during the progress of the suit, the plaintiffs in an amended petition, prayed judgment for \$562 50 as damages arising from the failure of the defendant to deliver the cotton at the time agreed upon, and they limit their demand to this sum in damages. The answer admits that the defendant sold to the plaintiffs twenty-five bales of cotton but avers that the plaintiffs failed to cause the cotton to be weighed on his order of delivery and to pay for it within the usual delay of three days and which never exceeds five days, without the formal consent of the factor; that defendant upon this failure of the plaintiffs to receive, weigh and pay for the cotton in conformity with commercial usage, had the right to retract and refuse to deliver it. The defendant had judgment in his favor and the plaintiffs have appealed.

A number of witnesses versed in the cotton trade and acquainted with the usages and sales by which cotton is sold in the New Orleans market, was examined on the trial of the case. They agreed generally as to the custom and practice in conducting sales of this staple, but there was less uniformity among them in their views regarding the compliance with the established custom by the parties litigant in this case.

The facts seem to be, that the plaintiffs bought the cotton on the twenty-ninth of December and defendant expressed a desire that they

should receive it as soon as possible, giving to them as usual an order for the delivery of the lot of cotton purchased by them. It is shown that the defendant, from time to time, up to the fifth of January, called upon the purchasers, urging them to receive and pay for the cotton, the plaintiffs all the while deferring the matter, saying they had not had time to attend to it, that it would be received as soon as possible, etc.; and on one occasion being called upon to know when the purchasers would receive the cotton, one of them answered gruffly: "I will receive it whenever it suits me, whenever I am at leisure."

On the evening of the fifth of January, however, the plaintiffs notified the defendant that they had given positive instructions to their "classeur" to receive the cotton the next day, the sixth of January. On that day at ten o'clock, A. M., the defendant gave the plaintiffs notice that unless they intended to receive the cotton by twelve o'clock of the same day, he would give orders not to deliver it. The cotton was sold at the price of twenty-three and three-quarter cents per pound. A short time afterward it went up to twenty-eight and three-quarter cents. The purchase was advantageous to the plaintiffs, and there is no ground for supposing they were in bad faith in delaying to receive the cotton, however dilatory they may have been. It is contended on their part that they were entitled to the whole period of business hours of the last day within which to receive the cotton; that on the ground that the seller had the right, after the procrastination of the purchasers to receive, to give them notice of his intention to terminate the contract in the event of their failure within a specified time to comply on their part, still he should have given a reasonable time for the compliance, which they insist he did not give. It is not shown that it was impossible, or even that it would have been exceedingly difficult or inconvenient for the plaintiffs, to have gone or sent a person to the cotton press and received the twenty-five bales in two hours' time. The seller appears to have been sedulous, if not importunate, in his endeavors to close the sale, and to have extended the period, usual after a sale for receiving and paying, to its utmost limits. The buyers, on the other hand, continued tardy and inactive until the sixth of January, when the defendant's "patience," as he expressed it, "was at an end." The short quarters then given, we think under the circumstances, the plaintiffs should have submitted to.

We think the decree of the lower court correct. It is therefore ordered that it be affirmed with costs.

No. 4985.

STATE OF LOUISIANA v. PETER MAXWELL.

This court can not perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in the State has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law; for the effect would be the same.

Probably there never has been an assessment which embraced all the property of the State, but that fact did not render the assessment unconstitutional. When the omission is discovered, the property must be assessed, for the constitution and laws require that all property shall be assessed.

Certain questions discussed in this controversy can not be considered by this court, as they do not relate to the legality or unconstitutionality of the law, but relate to questions of fact, such as whether the Auditor made accurate calculations for the purpose of the assessment for taxes, or exceeded his authority, as the amount in dispute is less than five hundred dollars; wherefore this court has not jurisdiction for that purpose.

The defendant can not raise the question concerning the legality of the warrants, to pay which the one mill tax is said to be levied, as the holders of said warrants are not parties to this suit; and the amount of revenues to be raised is a matter within the Legislative discretion.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, and *F. O. Remick*, Assistant Attorney General, for plaintiff and appellee. *J. G. Devereux*, for defendant and appellant.

LUDELING, C. J. This is a suit by the State for \$150 50, taxes due by defendant for the year 1871. This case is, therefore, appealable only on the ground that the tax is alleged to be unconstitutional.

The ground upon which the tax is alleged to be unconstitutional is, that "household goods, silver plate, jewelry, and mechanics' and laborers' tools, to the amount of five hundred dollars in each household" are exempted from taxation. This question was decided in the case of *Morrison v. Porter Larkin*, tax collector, 26 An. 699. The court said, "While the exempting of the property in contravention of the constitution may be void, the levying of the tax is constitutional." And the court said further, "There is then no inequality of which the plaintiff can complain." We adhere to the opinion then expressed. We can not perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in this State has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law, for the effect would be the same. We imagine that there never has been an assessment which embraced all the property of the State; but that fact did not render the assessment unconstitutional. When the omission is discovered the property must be assessed; for the constitution and laws require that all property shall be assessed. The other questions discussed in appellant's brief can not be considered by this court, as they do not relate to the legality or constitutionality of the law, but they relate to questions of fact, such as whether the Auditor made

accurate calculations for the purpose of the assessment, or exceeded his authority, as the amount in dispute in this case is less than five hundred dollars. This court has not jurisdiction in the case for that purpose. Nor can the defendant raise the question concerning the legality of the warrants, to pay which the one mill tax is said to be levied, as the holders of said warrants are not parties to this suit, and the amount of revenues to be raised is a matter within the legislative discretion.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

HOWELL, J., *concurring* in the decree. I think we have jurisdiction of the case in so far as the constitutionality or legality of the tax is in contestation, whatever may be the amount. Constitution, article 74.

The defendant is taxed on real estate only, and he says the tax is unconstitutional because \$500 of movable property is exempted, which if included in the assessment would make the rate less.

If it be unconstitutional to exempt any portion of the movable property, it will not relieve defendant from the tax in this case, because the tax as to all other property is in accordance with the law, which is not unconstitutional in whole, but only as to the exemption, if at all. This is the principle in the case in 24 Cal. 433, cited by him. We have also applied the same principle in more than one case. And the rate of taxation is a legislative matter.

He next contends that the Auditor has not made an accurate calculation of the rate of taxation necessary to pay the interest on the bonds of the State, as he is directed to do in act No. 42 of 1871, under which this tax is levied and collected.

The legal authority of the Auditor to make this calculation is not questioned, but it is said he has levied a larger rate than is necessary. On this point I must concur with the Chief Justice that our jurisdiction depends on the amount involved in this suit. It is simply a question of fact and not a legal or constitutional power or right. If the calculation is correct, it is conceded that the tax is constitutional, and whether it is correctly made or not is a question of fact, and the amount of defendant's tax involved in this suit does not give us jurisdiction of the case.

I agree also with the Chief Justice that we can not declare the one mill tax, levied to pay certain outstanding warrants, illegal or unconstitutional, because proper parties are not before us.

As to defendant's bill of exceptions, he says, all that is material or as much as he thinks necessary to his case, is in the record and annexed to his bill, and he says it will therefore be unnecessary to re-

mand the case. The only objection made to the evidence was, that no evidence was admissible to sustain the grounds of defense as set out. In the view I take of the case, I think it unnecessary to pass on this bill of exceptions.

I concur in the decree.

WYLY, J., *dissenting*. The defendant resists the payment of his taxes for the year 1871 on the following grounds:

First—Act No. 42 of the acts of 1871, under which the levy was made, violates article 118 of the constitution, because paragraph seven of the second section thereof exempts from taxation "household goods, silver plate, jewelry, and mechanics' and laborers' tools to the amount of five hundred dollars, in each household."

Second—Said act violates article fifteen of the constitution, vesting the legislative power of the State in the General Assembly, because the eighth section thereof makes it the duty of the Auditor, in order to provide for the payment of the annual interest on all the State bonds, "at the end of each and every year, or as soon thereafter as he shall receive the assessment rolls, to determine, by accurate calculation, what rate of taxation on the total assessed value of all the movable and immovable property in the State will be sufficient to pay the interest becoming due annually on all the bonds issued by the State, or those that may be issued hereafter; and said tax, as ascertained and fixed, is hereby levied on all the movable and immovable property that may be assessed in this State." * * *

Third—Assuming the constitutionality of the power conferred on the Auditor, he has failed to exercise it according to the terms of the law by making an "accurate calculation" for the purpose of raising a fund to pay the interest on the bonded debt of the State; that he has intentionally fixed an excessive rate of taxation, for purposes not contemplated in the law, "thereby attempting to extort from petitioner, in common with other taxpayers, the enormous excess of \$450,000" over and above the sum required to pay the interest on said bonded debt.

Fourth—The one mill tax levied under act No. 81 of the acts of 1872 is void, because said act is repugnant to the constitutional amendment limiting the State debt to \$25,000,000, and also repugnant to article 114 of the constitution, the object of levying the tax not being expressed in the title.

The defendant sought to introduce evidence in support of the averments of his answer, which he clearly had the right to do, and it was rejected by the judge on the ground "that no evidence was admissible to sustain a plea or defense to a suit by the State for taxes, founded on the alleged nullity either of the assessment rolls of the State, or of the

whole or of a part of the levy of taxes; that is, on the ground of their being repugnant to the constitution of the State, or inconsistent with statutory law."

How could the defendant establish his constitutional objection to the assessment of one mill under act No. 81 of acts of 1872 if he be denied the right to prove that the State debt exceeded \$25,000,000, when the debts were contracted which act No. 81 contemplates to pay?

How could the defendant, without proof, establish his averment that the Auditor has not made an accurate calculation of the rate of taxation on the appraisement of the movable and immovable property in the State, as required by act No. 42 of the acts of 1871, and that he has intentionally fixed an excessive rate, so that the total amount raised thereby will be \$450,000 in excess of the sum required to meet the funded debt of the State?

It is manifest that the defendant was entitled to introduce proof in support of the averments of his answer, and that his bill of exceptions was well taken. It would be useless to cite him to trial, if he had not the right to introduce proof to establish his defense. The question is not whether his proof would be sufficient to establish the defense; it involves a principle vastly more important, namely, whether a defendant shall be condemned who has been denied the right accorded in every court of justice in the civilized world, the right to introduce competent evidence in his own behalf.

The fact alleged in the answer that the Auditor has intentionally fixed a tax upon defendant and other taxpayers of \$450,000 in excess of the sum required to meet the interest on the bonded debt of the State, is a fact necessary to be established by proof, in order to determine the legality of the tax. The law makes an appropriation sufficient only to meet the interest on the bonded debt of the State, and requires the Auditor, as an accountant, to make an "accurate calculation" and fix the rate of the tax thus appropriated.

Now if the Auditor fixes, intentionally, a tax at \$450,000 in excess of this requirement, he fixes a tax to that extent beyond the appropriation, and it is illegal. How is the defendant to show this illegality in the tax, if he is debarred from proving the fact alleged by him?

A tax, \$450,000 beyond the appropriation, is *pro tanto* as illegal as one wholly beyond the appropriation. And a fact necessary to establish the one is just as admissible as a fact necessary to establish the other. Any tax beyond the amount authorized by law is illegal, and the fact can be shown regardless of the amount involved in the suit. In a tax case, law and fact are so intermingled that it is almost impossible to separate them.

But I take the position that in a tax case this court has jurisdiction

of the whole case, law and fact, and this court has never heretofore held differently. The jurisdiction of this court is fixed in the unambiguous language of article 74 of the Constitution. There the plain distinction is drawn between civil and criminal cases. In the former, law and fact are both revisable, on appeal, by this court. In the latter, only questions of law are revisable. This is the marked distinction between civil and criminal cases, so far as the appellate powers of this court are concerned. If the framers of the constitution had intended tax cases, or any class of tax cases, to be revisable only on questions of law, like criminal cases, most assuredly they would have said so when they framed article 74. In ordinary civil cases they fixed the jurisdiction of this court to appeals where the matter in dispute exceeds \$500; and they extended the jurisdiction of this court "to all cases in which the constitutionality or legality of any tax, toll or impost of any kind or nature whatsoever, or any fine, forfeiture or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof; and in criminal cases on questions of law only." * * *

In precise terms the constitution limits our appellate jurisdiction in criminal cases to "questions of law only." The clear implication from this express limitation is, that in all other cases it shall not apply—in all civil cases the whole case, law and fact, is revisable.

Suppose the clause in regard to criminal cases had been omitted, and it was nowhere to be found in the constitution, where would there be any limitation upon the revisory powers of this court in appeals in tax cases? There would be none, and the whole case could be revised. Now shall we extend an exception or limitation upon the appellate jurisdiction of this court, confined in precise terms to criminal cases, to other cases? If so, why not as well extend it to all other cases and at once break down the limitation expressly applied to criminal cases by the framers of the constitution.

The law is unambiguous and ought not to be construed to contain an exception or limitation not contained in it. There is no safety in construing an exception or limitation expressly stated to apply only to criminal cases, to other cases or to tax cases; and this court is not permitted to resort to construction where the law is clear and free from ambiguity. Revised Code, article 13.

I therefore dissent in this case.

Rehearing refused.

Q3. . . .

LIST OF CASES NOT REPORTED.

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1875.
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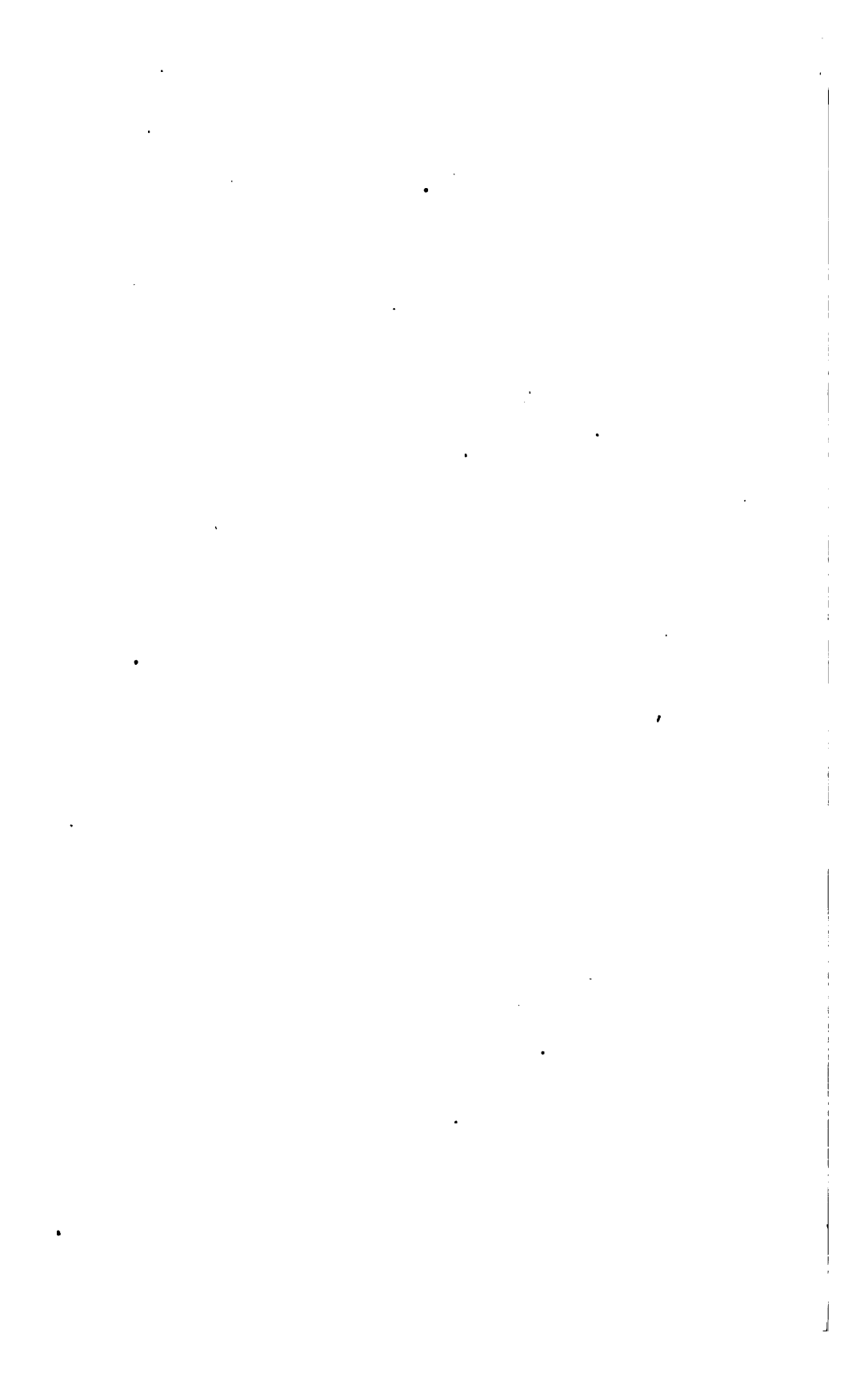
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No. 543—G. M. Bayly & Pond v. Nestor Norsworthy.
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ACTION.

1. This is an action of nullity brought by plaintiffs against a judgment, on the ground that it was rendered against them in the absence of their counsel, in consequence of the omission of the clerk to attach his name as attorney for them on the usual list posted up, wherefore they were deprived of the defense to which they were entitled. This omission was not attributable to the other litigants or to their counsel. It was merely an error of the clerk.

In this instance the plaintiffs have mistaken their remedy. The true one was an appeal. Their defense to the suit was, that the tacit or legal mortgage set up against them was not inscribed prior to the first of February, 1870. Relief was therefore attainable by appeal. Consequently an action of nullity will not lie.

B. Esterbrook and A. Gallier v. Mary E. Gauche, 36.

2. The defendant objected to this action on the ground that the petition disclosed a partnership, and between partners only an action for the settlement of the partnership will lie.

The court *a qua* erred in overruling the exception. The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer *Ella May*. The objection to the form of the action should have been maintained.

M. N. Radovich v. Louis Frigerio, Jr., 68.

3. Plaintiffs are not seeking in this case to recover a specific piece of property which they allege to have been unlawfully taken from them and found in the possession of defendants. The petition declares upon an indebtedness, inasmuch as the petitioners say that defendants are indebted to them in a certain sum of money, which one in their employ unlawfully took from them and which was subsequently taken from him in an unlawful manner by defendants who keep a gambling establishment. The court *a qua* did not err in dismissing the petition which showed no cause of action.

Steamboat Carrie Converse and Owners v. Jacob Feitig et als., 117.

4. The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt.

ACTION—Continued.

A purchaser at sheriff's sale can not maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure.

An adjudication under an illegal or insufficient seizure conveys no title.

In this case, the whole proceeding purporting to be *in rem* was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in actual possession thereof. The special law establishing certain formalities to be observed in judicial proceedings in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, does not apply to a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages.

Dennis Cronan v. Edward Cochran et als., 120.

5. The third opponents in this case attempt to regulate the effect of a seizure by a creditor with special mortgage and vendor's privilege, in what relates to them or their junior mortgage, eighteen months after the seizure had been released, the sale consummated, and the funds distributed. This is an extraordinary proceeding. There is no longer any ground for a third opposition to stand upon. The exception that there is no cause of action is well taken.

Payne, Dameron & Co. v. Eaton & Barstow—E. J. Gay & Co., Third Opponents, 160.

6. While there are facts in the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and the son as to the creditors of the former, yet the sale of the property in question from the former to the latter can not be treated as a pure simulation. The sale may have been resorted to for the purpose alleged by the plaintiff, but, whether for fraudulent purposes or otherwise, could only have been successfully assailed by a regular revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

Currie, King & Co. v. J. O. Pierce et als. Scott & Brother v. The Same. (Consolidated). 268.

7. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and

ACTION—Continued.

resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferrer, the payee thereof, was a citizen of this State and had no such right.

New Orleans Canal and Banking Company v. The Recorder of Mortgages of the Parish of Pointe Coupees et als., 291.

8. Plaintiff claims a certain amount of money alleged to have been loaned to defendant. The conduct of plaintiff, under the circumstances of the case, is such as not to leave it free from the suspicion that it was regulated so as to insure, under the guise of a loan, the payment of the losses of defendant in a gambling house kept by plaintiff, when the payment of said losses could not directly be enforced on account of immoral consideration and from the violation by the parties of a prohibitory law. Courts of justice are not open to litigation of this kind.

H. J. Sampson v. Norman Whitney, 294.

9. Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within that delay, or the action, if excepted to, will be dismissed. In this instance the suit should have been brought within ten days after the election. The court below erred in not maintaining the exception of the defendant on that ground. The law is not ambiguous, and no room is left to the discretion or equity powers of this court; it must, therefore, be administered as it is, however unwise some of its provisions must appear.

J. L. Belden v. Thomas P. Sherburne, 305.

10. All actions against the city of New Orleans, for work or labor done, either under a contract or for damages, or extra work, are prescribed unless commenced in one year from the time such work is required to be performed, or such damages are alleged to have arisen.

John Wolf v. The City of New Orleans, 309.

11. The plaintiffs, as heirs of Isaac Lay, sue the succession of O'Neal for a large sum to be paid in the course of administration, and allege in substance that O'Neal was their tutor for many years. The defendants have excepted to the mode of action and to the jurisdiction of the court. The judge *a quo* erred in overruling the exception.

The plaintiffs should have called upon the executrix of the deceased, O'Neal, to file an account of his tutorship, and by opposition to the account, should have raised the issues involving its correctness, and then have the various matters in contestation duly proceeded with and determined in their regular order, and the tutor's liability, if any, definitely fixed by final judgment of the parish court.

ACTION—Continued.

Instead of this proceeding, the plaintiffs bring suit in that court against the succession of O'Neal for an arbitrary amount, which they fix themselves as the indebtedness of the tutor, and pray judgment against the succession for that sum, an amount far above the jurisdiction of that court in a direct action for a specific sum of money. This is illegal, and can not be maintained.

Sarah L. Lay et als. v. Succession of Elias O'Neal, 643.

12. This court will have nothing to do with a suit springing from a fund created for the purpose of corrupting and improperly influencing members of the Legislature in their action on matters of legislation then before them.

Wm. Durbridge v. The Slaughterhouse Company, A. J. Oliver intervenor, 676.

SEE PRIVILEGE, NO. 4—*Crescent City Gaslight Company v. New Orleans Gaslight Company*, 138.

SEE COMMUNITY, NO. 4—*Julia Williams and Husband v. Fuller*, 634.

SEE OFFICES AND OFFICERS, NO. 12—*State ex rel. Milliken v. Ward*, 659.

ADMINISTRATOR AND ADMINISTRATRIX.

1. Parol evidence was clearly inadmissible to prove that the wife of the defendant was the debtor in a contract executed by him, and that he signed it as her agent, and not in his individual capacity as it appears in the contract itself, no error or mistake in executing the instrument being alleged in the answer.

This testimony being excluded, there is no reason why the defendant, who was not one of the heirs of his wife's father, should not pay the debt he contracted with the administrator of the succession, whether there are, or not, sufficient funds in his hands to pay the debts of the deceased.

If the plaintiff had consented, when the instrument was given, in consideration of the purchase by the defendant of succession property, that said defendant should not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

O. W. Fluker, Administrator v. Amos Kent, 37.

2. The right of the administratrix to revoke her power of attorney to administer the affairs of the estate which she had in charge, can not be doubted. All acts done by her agents under said special power, subsequently to the revocation and notice to them of the revocation, can not be considered as binding upon her. The ac-

ADMINISTRATOR AND ADMINISTRATRIX—Continued.

count filed by them was without effect and the court *a qua* erred in acting upon it.

Succession of Francois Babin—Opposition to account of Administratrix, 114.

3. After the decease of his wife, the plaintiff, administrator of community property, gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux obtained judgment, issued execution, and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale. The record shows that the estate has not been settled up; there are debts outstanding against it besides the one for which the administrator gave his note. Under such circumstances, the seizing creditor could expect only to be paid concurrently with other creditors of the estate in the due course of administration. His proceedings are illegal and irregular.

Lovel Ledoux, Administrator, v. J. E. Breauz, Sheriff, et als., 190.

4. The land in controversy having been sold as the property of R. W. Graves, and his legal representative—the curator or administrator of his succession—having been cited to answer both the original and amended petitions claiming said land, and issue joined thereon as to him, the judgment for the land according to the corrected description was proper, but the judgment for the rent was erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of trespass of their mother, now deceased, as well as their father. They could only accept with benefit of inventory, and take the succession of their mother after its debts were paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.

Thomas H. Hunt v. Mrs. A. V. Graves, 195.

5. Where the property of the succession was offered for sale for cash, and, no one bidding, it was immediately offered on the terms of credit designated in the order, and was adjudicated to the administrator thereof, who directed the sheriff to adjudicate it to one Mrs. Simmons, a person having no real intention of purchasing, but receiving the adjudication only as an act of friendship to the administrator: .

Held—That the succession never was divested of the property.

Ambrose et al. v. Madison Marsh, 241.

6. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the use of, etc. v. Succession of Patrick Halpin, 382.

ADMINISTRATOR AND ADMINISTRATRIX—Continued.

7. Conceding that there was in this case such a contestation for the administration of the estate of the deceased as to authorize the appointment of the public administrator to administer until the final decree determining the rights of the respective claimants, as provided by section two of act 87 of the session of 1870, the judge erred in giving the permanent administration to him, as this is not a case in which the public administrator could be appointed, the heirs being present and represented. When the major heir failed to furnish bond and qualify, the tutor of the other heir should have been appointed.

Successions of Daigle and Mary Jane Roddy, his wife, 524.

8. The law establishing the office of public administrator did not repeal the clause of the article of the Civil Code, giving the wife, under certain contingencies, the right to administer the succession of her husband. The succession of Miller is not of that class of vacant successions which the law authorizes the public administrator to administer *virtute officii*.

The judgment of the court below is erroneous in allowing commissions to the public administrator. He was wholly without right to administer the estate, and he knew it. His pretension that he was appointed to administer provisionally, does not help his case. The provisional appointment was improperly made.

The provisional appointment of the public administrator to administer an estate applies only to cases of contestation between third parties, not to cases where the public administrator himself is a contestant, and especially where he puts up that contestation for his own profit.

Whatever charges have been incurred for inventory, appraisal and proceedings to put the opponent, Mrs. Miller, in possession, are to be at the cost of the succession, but not the costs incurred by her opposition to the public administrator's claim to administer the estate.

Succession of Everett Miller—Contestation in regard to administration and oppositions to the account filed by the Public Administrator, 574.

SEE JURISDICTION—No. 12—*Succession of William Bobb, 344.*

SEE MORTGAGE—No 13—*Succession of Gayle, 547.*

AGENT AND PRINCIPAL.

1. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State.

AGENT AND PRINCIPAL—Continued.

P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

M. A. Dockham and Husband v. Jonathan Potter, 73.

2. The right of the administratrix to revoke her power of attorney to administer the affairs of the estate which she had in charge, can not be doubted. All acts done by her agents under said special power, subsequently to the revocation and notice to them of the revocation, can not be considered as binding upon her. The account filed by them was without effect and the court *a qua* erred in acting upon it.

Succession of Francois Babin—Opposition to account of Administratrix, 114.

3. The defense to the plaintiff's claim is the prescription of three and ten years. The relation of the parties was that of agent and principal, and the right of the planter to sue his factor for an account is only prescribed by ten years. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying, as to an open account.

J. E. Prudhomme v. O. B. Plache et als., 133.

4. In this case it can not be doubted that the plaintiff had the right to manage her plantation, which was paraphernal property, and that a mandate having for its object the management thereof has a lawful object. Therefore, as there is no law forbidding the plaintiff from appointing her husband an agent to aid her in the administration of her plantation, it must be concluded that she had the right to do so.

The thing seized being raised on the plantation of plaintiff, which she administered, aided by her husband as agent, it follows that it was her separate property, and not liable to seizure by her husband's judgment creditors.

Amelia Simoneaux, Wife of Emile E. Lauve, v Edgar P. Helluin, Sheriff, et al., 183.

5. Clark, as agent of Mrs. Lane, having entered into a contract of assurance with defendant and paid the premium with her means, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

George D. Pritchett v. Mechanics and Traders' Insurance Company. Mrs. Sarah O. Lane, Intervenor, 525.

SEE EVIDENCE, No. 13—*Davidson & Hill v. Bodley*, 149.

ALIMONY.

1. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the use of, etc. v. Succession of Patrick Halpin, 382.

APPEAL.

1. This appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, on the twentieth of July, 1874, the relator procured the consent of the Governor for the transfer of the case to Monroe, and for its trial at the term held at that town. The Governor also employed an attorney for the defense, notwithstanding the opposition of the Attorney General and of Dubuclet, the defendant.

The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and the act 21 of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

- The citation was necessary to perfect the appeal. The defendant's case can not be tried without his consent, except at the time and place designated in the citation. A trial at a different place would be a trial without a citation. Besides, he is entitled to the delay fixed, to prepare his defense.

The plea that defendant is not interested, has no force. If not interested, why was he cited and made a party?

There is nothing in the act for "funding the obligations of the State," relied on by relator, which confers on him or implies a right or duty, as "Fiscal Agent," to recover from the State Treasurer, and to hold and account for, under the obligations of his official bond, all the moneys belonging to the State, or to choose a bank for such purpose, and nothing which imposes on said treasurer the duty to deposit said moneys with the relator, and therefore there is no cause for the mandamus prayed for.

It is only where a specific, ministerial duty is imposed by law on an officer, that the writ of mandamus can properly issue against him. The term "fiscal agent" does not necessarily mean depository of the public funds, so as, by the simple use of it in a statute without any directions in this respect, to make it the duty of the State Treasurer to deposit with him any moneys in the treasury and confer on such agent power to compel such deposit.

State ex rel. Albert Baldwin v. A. Dubuclet, State Treasurer—State of Louisiana intervenor, 29.

2. This is an action of nullity brought by plaintiffs against a judgment, on the ground that it was rendered against them in the

APPEAL—Continued.

absence of their counsel, in consequence of the omission of the clerk to attach his name as attorney for them on the usual list posted up, wherefore they were deprived of the defense to which they were entitled. This omission was not attributable to the other litigants or to their counsel. It was merely an error of the clerk.

In this instance the plaintiffs have mistaken their remedy. The true one was an appeal. Their defense to the suit was, that the tacit or legal mortgage set up against them was not inscribed prior to the first of February, 1870. Relief was therefore attainable by appeal. Consequently an action of nullity will not lie.

R. Esterbrook and A. Gallier v. Mary E. Gauche, 36.

3. It has been decided that a devolutive or suspensive appeal from a final judgment of a district court, does not suspend prescription pending the appeal. Therefore prescription, running in this instance from the twelfth December, 1863, the day on which the judgment relied on by plaintiff was rendered, which judgment was affirmed on the tenth January, 1867, was not interrupted by this suit instituted on the fifth of December, 1871, and fixed for trial on the eleventh September, 1874, on motion of plaintiff's counsel, when, on that day, the defendant filed the plea of prescription.

Samory v. Montgomery, 50.

4. The answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss.

Rhoda E. White v. Mgra Clark Gaines, 75.

5. This court will, of its own motion, dismiss an appeal for want of pecuniary interest in the appellant.

Block, Britton & Co. v. Barton, Miller & Co., and Peet, Yale &

Bowling v. The Same—Lewis & Co. and Clinton intervenors, 89.

6. The judgment in this case having been rendered at a different term from that at which the appeal was applied for, the appeal could be taken only by petition and citation. Therefore the motion to dismiss must prevail.

Mrs. Mary Hardy v. John A. Stevenson, 95.

7. When an appellee asks for an amendment of the judgment, he will not be allowed damages for a frivolous appeal.

Francis O. Mahan, Liquidator, et al. v. Frederick Michel and Wife, 96.

8. Where the minutes of the court below do not show that the order was allowed on the motion for an appeal, but where it is stated elsewhere in the record by the judge that he did grant the order, this court will not be disposed to make an appellant suffer for such neglect of duty by the clerk of the court *a quo*.

APPEAL—Continued.

Where a suspensive appeal was allowed, but the bond was not filed until more than ten judicial days after the judgment was signed;

Held—That the bond being for the amount fixed by the judge, the only penalty incurred by the appellant was the right of the appellee to issue execution, the appeal operating simply as a devolutive one. The *ex parte* order setting aside the appeal, under the circumstances, did not divest this court of jurisdiction.

Albert B. Edgerly, Executor of John Marshall, deceased, v. W. G. Smith, 97.

9. Where final judgment was rendered in favor of the two members of the defendant firm, who were before the court, and the appeal was taken as to one only;

Held—That both defendants having an interest in maintaining the judgment, should both have been made parties. The motion to dismiss the appeal must prevail.

Lucy Hammit and Husband v. Payne, Huntington & Co., 100.

10. It is the duty of the appellant to bring up a complete transcript, or in proper time suggest a diminution of the record, in order that it should be corrected, if possible, and the trial be proceeded with. The fault being imputable to the appellant, the appeal must be dismissed.

Widow F. L. Charbonnet v. Edward Dupasseur et al.—A. Roche-reau, Intervenor, 105.

12. A motion to dismiss an appeal on the ground that it is frivolous can not prevail, although it may be a good one for giving damages when the case shall be tried on its merits.

A party may obtain judgment on motion after ten days notice.

Henry Reiners v. Valentine St. Ocran—S. D. Maxwell, Surety on Appeal Bond, 112.

13. Where it clearly appears that neither the motion in open court was made, nor an order granting an appeal was obtained within the required time, the motion to dismiss must prevail.

E. A. Deslonde, Testamentary Executor v. The State National Bank, 119.

41. That the matter in dispute in this case against each of the plaintiffs is less than \$500, is no ground to dismiss the appeal. The matter in dispute is the sum claimed by defendants under a contract with the city, and the amount in the contract far exceeds \$500. The controversy as to them involves the validity of the contract. As they could appeal from the judgment, had it been against them, the plaintiffs also can appeal.

It is sufficient that the surety has signed the appeal bond—the appellants, parties to the suit, being bound without signing the bond, to abide the result of the litigation.

APPEAL—Continued.

The appeal bond was filed in time. The delay occasioned by the mandamus proceedings to compel the judge to grant the appeal, can not prejudice the appellants.

It is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the counsel for that purpose. It is sufficient if it be done by those on the portion sought to be improved.

James Ready et als. v. City of New Orleans et al., 169.

15. Where the transcript of the appeal was filed on the seventh of November, 1874, and on the eleventh the defendants, appellees herein, filed an answer praying for an amendment of the judgment, and where on the fourteenth they moved to dismiss the appeal, because the appeal bond was not for a sufficient amount, because the transcript was not filed in time, and because the clerk certifying the record omitted to append his signature :

Held—That the motion came too late.

Besides, having joined in the appeal, the appellants ought not to be heard asking for its dismissal.

The certificate appended to the record should be signed by the clerk.

This court, of its own motion, orders it to be done, and denies the motion to dismiss. *John T. Michel v. Zerilla Meyer et al.*, 173.

16. The respondent refuses to grant to relators a suspensive appeal on the ground that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor or against them from which they could appeal. In this there was error on the part of the judge *a quo*. If the relators were not parties to the suit, it was because the judge erroneously refused to allow them to intervene. But third parties may intervene when they allege, as they do in this case, that they have been aggrieved by the judgment.

State ex rel. Mrs. Pecot et al. v. Parish Judge of the Parish of St. Mary, 184.

17. The certificate of the clerk of the court *a qua* as to all the matters in regard to plaintiff, defendant, and the intervenors who have appealed, is sufficiently full. The proceedings as to the intervenor Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect the parties.

The record shows that the citations on the intervenors were served, but before the specified delay expired, and before issue was formed thereon either by default or otherwise, the plaintiff caused the default taken by her against the defendant to be confirmed and the intervention dismissed. This was irregular and premature. Issue should have been joined.

Mrs. S. O. Lane v. Joshua G. Clarke—Heirs of Lane et als. intervenors, 201.

APPEAL—Continued.

18. The relator having applied for a rule on the sheriff to show cause why said sheriff should not retain in his hands a certain piece of property which he was going to release, and having prayed for an injunction in the meantime, the judge *a quo* refused the rule and injunction; the relator has appealed and applied for a mandamus to compel the judge to grant the appeal. The remedy is not by appeal from such a refusal. There was nothing done in the lower court for this court to revise.

State ex rel. E. J. Gay v. Judge of the Fifth Judicial District Court, 211.

19. A judgment acquiesced in and partially executed can not be appealed from.

The plea that acquiescence in a judgment can not be given by a police jury so as to prohibit a parish from appealing from a judgment rendered against it, is not tenable. There is no reason why a parish should not be bound by the acts of its agent as an individual would be.

O. K. David v. The Parish of East Baton Rouge, 230.

20. The indorser of a note having obtained a suspensive appeal from a judgment against him as such, and having given as surety on the appeal bond the maker of the note, against whom a separate judgment was rendered in the same suit, and the parties having severed in their defense;

Held—That in cases previously decided, the sufficiency of such a surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

State ex rel. John Coleman v. Judge of the Sixth District Court, Parish of Orleans, 234.

21. Appellant gave no bond under the order for a suspensive appeal, but gave bond after getting an order for a devolutive one. This was not an abandonment of an appeal. There is no appeal until the bond is given, it matters not how many orders of appeal have been granted.

As the sheriff is a mere depositary, in this case, of the funds sought to be distributed, he has no interest in the controversy, and need not be made a party to this appeal.

Bank of America v. Septime Fortier. Third opposition of E. J. Gay & Co. Third opposition of Citizens' Bank, 243.

22. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign recip-

APPEAL—Continued.

rocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal, refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

Isaac F. Riley v. Heirs of E. M. Riley, 248.

23. The motion to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk can not prevail. The bond was executed in favor of John S. Lanier, whom the record shows to be clerk. *Succession of Mrs. S. B. Fuqua*, 271.

24. The suggestion to dismiss this appeal is made under the statute No. 25, acts of 1874, but is not, in reality, supported by any one of its provisions. An appeal can not be dismissed upon a mere suggestion in argument, after the case has been taken up on its merits, without any reservation of the right to move to dismiss.

Succession of G. S. Dufossat et al. v. B. S. Labranche et al.

Opposition of R. Brown et als., laborers, 283.

25. This is a suit personally against a tutrix, one of the defendants, on six mortgage promissory notes given by her, and also as representing those of her children who were minors when the suit was brought, and the majors who joined in the act of mortgage, for the amount of the notes sued on, and for a decree of lien and privilege on the property mortgaged. The defendant, one of the heirs, a minor when judgment was rendered but now of age, appeals from said judgment.

The motion to dismiss defendant's appeal on the ground that all his joint obligors have not been cited and made parties to the appeal, can not prevail. He is not a joint obligor; his liability is as heir of his father, and his liability is fixed by his interest in his father's succession.

Vernon K. Stevenson v. Lavinia Edwards et al., 302.

26. The judgment having been rendered by default and no notice of judgment having been given when the appeal was taken, it was therefore in time.

The bond of appeal was given for the amount fixed to cover costs and in favor of the person who is clerk. This is sufficient.

The plea of prescription having been filed in this court and the appellee having asked that the case be remanded to show an interruption of prescription, under the law this must be done.

Charles Hoffman v. J. O. Howell and I. F. Riley, 304.

27. When the suspensive appeal bond was signed by Cox as agent for Palmer, if he had no authority to bind Palmer, he certainly bound himself, and it is not shown that he is not solvent and good as a

APPEAL—Continued.

surety for the amount of the bond. Palmer has subsequently ratified his action in express terms. Therefore appellee has not been without a surety personally good and sufficient to protect his interest pending the appeal. He has no cause to complain, and the judge *a quo* erred in setting aside the appeal.

State ex rel. W. Van Norden v. Judge of the Fifth District Court, Parish of Orleans, 306.

28. The motion to dismiss the appeal on the ground that there was no order of appeal, came too late, said motion having been filed more than three days after the transcript was filed.

A. W. Walker v. O. S. Sauvignet, Sheriff, et als., 314.

29. In the injunction case of Coons v. Cannon et als., on exception of no cause of action being disclosed by the petition, the injunction was dismissed as in case of nonsuit. Plaintiff, alleging that defendants were largely indebted to him, and in possession of the steamer Katie, of which he claimed to be part owner, and that they were about to sell her, had applied for an injunction restraining the sale, which was granted upon his furnishing bond in the sum of \$1000. From the order dissolving said injunction as aforesaid, plaintiff prayed for a suspensive appeal on his furnishing his bond in the sum of \$250. The district judge refused a suspensive appeal except on a bond of \$25,000, and appellant now applies for a mandamus to compel the judge *a quo* to allow the suspensive appeal on a bond of \$250.

It is true that no moneyed judgment is rendered against the relator, nor is he ordered to deliver any property, but he sought to restrain the defendants from selling a valuable piece of property worth \$60,000. The court below dismissed his pretensions. If he obtains a suspensive appeal on a mere nominal bond, he perpetuates the injunction, at all events, until his appeal is disposed of. His injunction bond being only for \$1000, it is easily seen that in case of failure, the defendants are without that security for damages which the law provides for them.

Under these circumstances, the bond which relator should be required to give on his suspensive appeal is not the value of the property in dispute, but the amount of damages which may result from the improper issuing of the injunction, and which this court thinks would be covered by the sum of five thousand dollars.

State of Louisiana ex rel. Temple S. Coons v. The Judge of the Superior District Court, 334.

30. The motion to dismiss is overruled. The questions at issue in this case are not of ordinary but of probate jurisdiction, and article 88 of the constitution provides that in all probate matters, when the

APPEAL—Continued.

amount in dispute shall exceed five hundred dollars exclusive of interest, the appeal shall be directly from the parish to the Supreme Court.

In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in this case, because it is a power essentially necessary in the settlement of successions, and as an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

Succession of William Bobb—Ernest Merilh v. W. L. Hodgson, 344.

31. The relator had the right to take a suspensive appeal within ten days from certain orders of the judge *a quo* in relation to the sequestration of his property, and the release thereof on bond, and any attempt to execute the order before that time expired was unauthorized, and when the appeal was taken, the parties were left in *statu quo* before the order, and the effect of the prohibition issued by this court is to maintain the parties in the position they were in before the rendition of the order appealed from.

State ex rel. Pierre Gourgotte v. Jean Porte et al., 431.

32. Where the certificate of the clerk is in the usual and proper form, if the appellant has not seen to having a proper record placed before this court and the evidence has not come up upon which he expects to get a judgment, he must take the consequence. If the evidence is necessary to plaintiff, he should have suggested a diminution of the record and called for a *certiorari*.

Samuel Choppin v. James Wilson, et al., 444.

33. The intervenor in this case, J. Q. A. Fellows, has not given bond for appeal. It is not sufficient for him to have joined the city in taking an appeal, and that the city has given bond for costs, the only bond that could be required. The intervenor is a separate, independent party in the litigation. The obligation of the city to pay costs does not cover the costs of intervention.

This suit is for the same purpose as that stated in No. 5735, previously reported. As pledgers, the relators have sufficient interest to demand that respondents shall perform the duties required of them by their pledgee.

State of Louisiana ex rel. Mississippi and Mexican Gulf Ship Canal Company v. The Administrators of the city of New Orleans, 469.

34. Where certain parties, whose claims did not exceed five hundred dollars, united with others whose claims exceeded that sum for each one of them and sued the city of New Orleans for several thousand dollars;

APPEAL—Continued.

Held—That having united in one suit for convenience and economy, and now desiring to sever, they can not thus be permitted to deprive the city of New Orleans of the benefit of an appeal, and that their motion to dismiss can not prevail.

Maurice N. Bowman et als. v. The City of New Orleans, 501.

35. The motion to mismiss the appeal made by each of the two plaintiffs, on the ground that all the plaintiffs were not made parties to the appeal, can not prevail. There is but one judgment in the case, for which an appeal was granted in open court within ten days after the rendition of the judgment and at the same term of court. No citation was necessary and both plaintiffs were made parties to said appeal, taken by motion. The fact that afterward a petition for an appeal was filed did not affect what was previously done.

The New Orleans Canal and Banking Company et al. v. The City of New Orleans, 505.

36. A motion to dismiss an appeal, to be entertained, must be filed within three judicial days after the return day.

A defect in a certificate would be no cause to dismiss an appeal, the fault being attributable to the officer whose duty it is to make the certificate.

A deputy clerk is an officer known to the law and is authorized to sign certificates.

Nicholas Burton et als. v. Charles Hicks et als., 507.

37. It is no part of the duty of the clerk of the Finance Department to execute or pay judgments against the city of New Orleans, so as to bind it, and particularly when said city had taken a suspensive appeal of which the clerk was not aware. It is no reason to dismiss the appeal, that the defendant and appellant has acquiesced in the judgment by receiving payment of taxes from the plaintiff in accordance with said judgment.

T. S. Serrill v. The City of New Orleans, 520.

38. This appeal has been taken and brought up, and the fact that it is designated as a suspensive appeal is not a cause for dismissal, on the ground that it is from a judgment on an opposition to the appointment of an administrator, which the law does not allow. There is no objection to the sufficiency of the appeal bond, which is for a sum fixed by the court, or the right to an appeal from the judgment as a devolutive appeal.

Succession of Treville Daigle and Mary Jane Roddy, his wife, 524.

39. This appeal was made returnable to this court on the first Monday of November, 1875, by the Superior District Court, parish of Orleans, and is made by law returnable at New Orleans. This court

APPEAL—Continued.

declines to try the case before the day it is made returnable, and at Monroe, a different place from that fixed by law, for the hearing of this appeal, even though the parties have consented to it.

State of Louisiana v. Charles Clinton. Frank Morey, Intervenor, 540.

40. Appeals from the Superior District Court of New Orleans are returnable at New Orleans. That court, therefore, was without authority to make this appeal returnable at Monroe. Consent can not give jurisdiction, neither can consent change the law which designates the place where appeals shall be returnable.

The Citizens' Bank of Louisiana v. The Board of Liquidation, 543.

41. The motion to dismiss the appeal because there is no day fixed for the return of the appeal, can not prevail. The appeal is made "returnable to the Supreme Court of the State of Louisiana at its next term, commencing in the city of Monroe on the first Monday of July, 1875." This was fixing the day with sufficient certainty.

Succession of W. H. Gayle. Opposition of G. King and others to final account of Administratrix, 547.

42. The appellant who shows title to the property in dispute can make any objection necessary to protect his interest.

Levy & Sugar v. Cowan & Mayo, 556.

43. Before the bond of the defendant and appellant was filed the plaintiff died. Subsequent to plaintiff's death, the required bond was filed.

The motion of plaintiff's representative to dismiss the appeal upon the ground that he is not properly before the court, can not prevail. Plaintiff's death did not interfere with defendant's rights. As soon as the bond was filed, the jurisdiction of this court attached. If the plaintiff has died since the appeal was granted, the proper parties will have to be made here.

James W. Howard v. O. Yale, Jr., & Co. Wimbush & Howell, Interveners, 621.

44. The motion to dismiss the appeal taken by plaintiffs can not prevail. To have filed in the parish court a petition similar to the one now under consideration after an appeal was granted from a judgment of the district court declaring that it had no jurisdiction, is not such an acquiescence in the judgment as will prevent an appeal.

The acquiescence which prohibits an appeal or destroys it when taken, is the acquiescence in a decree commanding something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in. Here nothing

APPEAL—Continued.

was ordered to be done. The judgment of the district court was simply that it had no jurisdiction. It did not order plaintiffs to institute proceedings in the parish court.

J. Buntin et al. v. E. M. Johnson, 625.

45. The sureties on a suspensive appeal bond can be made liable where execution issued on certificate of the non-filing of the transcript by the appellant, and the money could not be made after taking necessary steps against the principal.

Moore, Janny & Hyams v. Louis Lalaurie, 645.

46. The appellant will not lose his right to appeal because his surety on the appeal bond has become insolvent, and in such case it is the duty of the court to allow a sufficient surety to be substituted. This is precisely what the court below has done. It allowed appellant to give new security within ten days after the trial of the rule which decided the insolvency of the surety on the bond.

Appellant, who refuses to comply with this order and to substitute a new surety, has no right to expect this court to refuse to dismiss his appeal.

E. B. Benton v. F. O. Mahan, 649.

47. It was never contemplated that one sued before a justice of the peace could bring his case to be revised before the district or parish court, and before this court also. The right of double appeals is not conferred by the constitution.

State ex rel. Patrick Leahy v. Third Justice of the Peace, parish of Orleans, et al., 669.

48. An order of seizure and sale can be issued against mortgaged property transferred to a third possessor who assumed the payment of the mortgage debt, where the act of mortgage does not contain the non alienation clause.

Whether proper notice has been given to the parties entitled to it, can not be considered in this appeal from an order of seizure and sale. It has repeatedly been held in an appeal of this kind that the only question is, whether the evidence authorizes the issuing of the fiat.

J. B. Henry v. Meyer Goldman. Leon G'Sell, Appellant, 670.

49. The judge *a quo* refused to grant an appeal from his refusal to grant an injunction in chambers. This court can issue no mandamus in the matter. The judge *a quo* has, in this case, simply refused to act and grant an *ex parte* order upon an *ex parte* showing. This refusal can not be considered as a final judgment or an interlocutory order within the purview of the Code of Practice or any law from which an appeal lies, because it may work an irreparable injury. There is nothing for this court to revise, and hence there is no ground for an appeal. It would be virtually

APPEAL—Continued.

assuming original jurisdiction, were an order granted for an injunction, when none had been issued by the lower court. The non-action of the district judge in the premises can not be revised, amended or modified by this court.

State ex rel. H. Newgass v. Judge of the Superior District Court, parish of Orleans, 672.

50. There is no force in the objection of the respondent that appellant in applying for an appeal did not specially ask for a suspensive appeal. He applied for an appeal, and he gave bond within ten days for an amount sufficient for a suspensive appeal.

State ex rel. John G. Eustis v. The Judge of the Fourth District Court, parish of Orleans, 685.

51. According to law a suspensive appeal is to be taken within ten days from the notification to the party cast of the judgment complained of. But the requirements of the law are not prohibitory, and it is understood by this court that any engagement not prohibited by law and not repugnant to good morals may be enforced between the parties thereto. The law does not say that the parties may not agree that the time for making an application for a suspensive appeal may not be extended, nor does it forbid the parties from fixing the amount of the appeal bond among themselves. The provisions of the law on the subject are for the protection of the parties in litigation. Either party may waive his rights to this protection, and if he chooses to do so and contracts to do so, his contract can be enforced.

The district judge has the power of pronouncing on the question whether an appeal is or shall be suspensive or devolutive, and of saying whether the appellee shall be entitled to take out execution, notwithstanding the appeal. But when it is a judgment which this court may reform, when the case is within its jurisdiction, it may determine that an appeal is suspensive, which the district judge may have decided was devolutive. In the like manner this court can decide whether the surety is good and solvent, and revise the judgment of the lower court on this point.

Therefore, in this case, the application for a suspensive appeal, being made within the time agreed upon by the parties in interest and authorized to make the agreement, is valid.

State ex rel. Pontchartrain Railroad Company v. Judge of the Superior District Court et al., 697.

- 52 In a suit for dissolution, settlement and liquidation of partnership, the judge *a quo* having appointed a liquidator, one of the partners appealed from this interlocutory order. The case being called for trial on its merits, the appellant objected to its being tried pend-

APPEAL—Continued.

ing the suspensive appeal from the order appointing a liquidator. The court *a qua* erred in sustaining the objection and in continuing the case.

State ex rel. James Wood v. Judge of the Fifth District Court, parish of Orleans, 702.

53. A party obtaining an injunction prohibiting a sheriff from executing a certain judgment, can not, after the injunction is dissolved and no appeal taken therefrom, appeal from a decree of the court making absolute a rule taken upon the sheriff to show cause why he should not put the purchaser in possession of the property sold in execution of the judgment, after the dissolving of the injunction. The plaintiff should have appealed from the judgment dissolving the injunction, if injured thereby. He can not appeal from an order which merely carries out a decree.

State ex rel. Nicholas Schmidt v. Judge of the Second Judicial District Court, parish of Jefferson, 703.

SEE TAXES AND TAX COLLECTORS, NO. 7—*O. J. Flagg v. The parish of St. Charles*, 319.

SEE SURETY, NO. 5—*Leblanc v. Succession of Massieu*, 324.

SEE JURISDICTION, NO. 16—*Smith & McKenna v. Edwin Charles*, 503.

ATTACHMENT.

1. Cire, the subrogee of Powhatan Wooldridge to a judgment obtained by the same *v. E. Montouse*—which judgment was transferred from P. Wooldridge to E. Wooldridge, and by E. Wooldridge to Cire, caused a *fi. fa.* to issue in said judgment. Hedrick, the intervenor, took a rule against him to quash the writ, on the ground that he, the intervenor, was the real owner of the judgment, seized in the suit of Hedrick *v. E. Wooldridge*, and purchased by him at sheriff's sale. Hedrick had proceeded by attachment against E. Wooldridge, absentee. In this attachment case several citations were made, but it seems that in every instance the returns of the sheriff were simply that service of petition and citation was made on the curator *ad hoc* in person, mentioning the name of the curator. It appears from the returns of the sheriff, that in neither of the instances were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. A court can presume nothing with regard to a party being cited.

The failure to serve the proper citation is fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. Therefore the rule was properly discharged.

ATTACHMENT—Continued.

Subsequently to a decision of the lower court, that the order granted for a suspensive appeal on the part of the intervenor, plaintiff in the rule, did not suspend execution on the *fi. fa.*, said intervenor filed a petition of third opposition and prayed for an injunction, which was issued. To this proceeding an exception was filed, on the allegation that the grounds of action of the rule and of the petition for injunction were the same, and that the pendency of appeal on the rule supported the plea of *lis pendens* which was presented. This exception was properly maintained by the judge *a quo*.

Powhatan Wooldridge, Joseph A. Oire, subrogated v. E. Montouse, M. S. Hedrick intervenor, 79.

2. This court will, of its own motion, dismiss an appeal for want of pecuniary interest in the appellant.

This is a controversy between the creditors of Barton, Miller & Co., for a certain sum of money attached by plaintiffs in the possession of the Home Mutual Insurance Company.

The fact that the president of the Home Mutual Insurance Company knew that the defendants, Barton, Miller & Co., had given J. M. Lewis & Co., intervenors in this case, an order or draft on their agent, Charles Clinton, which he agreed to pay out of the funds of the drawers when collected from the Home Mutual Insurance Company, did not divest the legal title of Barton, Miller & Co. in and to said funds, nor place them beyond the reach of their attaching creditors, the plaintiffs herein. If the Home Mutual Insurance Company had been the drawers instead of Charles Clinton, the agent of the drawers, or if the funds had been attached in the hands of Charles Clinton, the case would have been different, and the authorities cited by counsel would have been applicable.

Block, Britton & Co. v. Barton, Miller & Co., and Peet, Yale & Bowling v. The Same. Lewis & Co. and Clinton, intervenors, 89.

3. Where a rule was taken to set aside an attachment, on the ground that the suit was based on a partnership transaction, and therefore plaintiff was not entitled to an attachment, for the reason that he could not swear to the amount due, until the rights of the partners should be settled according to law ;

Held—That the term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants. The objection to the attachment, on the ground alleged, is therefore not well founded. Where the question was whether the allegations in the petition and

ATTACHMENT—Continued.

in the affidavit were sufficient to warrant the issuing of the writ of attachment, and the plaintiff prayed for judgment for \$3500, or such amount as should be found due according to said allegations, and where the affidavit was that "all the facts and allegations in the above and original petition were true and correct, and that the defendants were disposing of their goods, rights and credits, with intent to defraud their creditors;"

Held—That the allegations were sufficient, and that the affidavit was in conformity with law. *Frederick Belden v. Read & Hunt*, 103.

4. This is a claim for damages for the illegal attachment of the plaintiffs' vessel in the suit of Sibley, Guion & Co. v. Fernie Brothers & Co. There was no just ground for seizing this vessel as the property of Fernie Brothers & Co., but there is some difficulty in fixing the damages to which plaintiffs are entitled. The true standard seems to be the expenses incurred and profits lost as the direct consequence of the seizure and detention, and as far as they are ascertainable on the part of the plaintiffs.

The British and American Steamship Navigation Company, Limited, et al. v. Sibley, Guion & Co. et al., 191.

5. It matters not what informalities affect the sale from Mrs. Pope, one of the defendants, to the intervenor. As the plaintiff is not a creditor of the seller, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given to the intervenor.

Joseph Moore v. Mrs. Sallie Pope and husband. Willis J. Pope, intervenor, 254.

6. This suit commenced by attachment. The proof is, that Jesse K. Bell leased his dwelling house and furniture; and that, declaring that it was his intention to be absent from the State for two years or longer, traveling for pleasure and health, he left the State without leaving any agent upon whom citation could be served. Shortly after he left, this suit was brought. At that time it would have been impossible to bring him into court except through his property. Under these circumstances the attachment was properly issued. The fact that he did not absent himself as long as he had expected did not affect the attachment previously issued.

Thomas P. Levethers v. John W. Cannon and Jesse K. Bell, 522.

SEE GARNISHMENT AND GARNISHEES, No. 7—*Phelps & Co. v. Boughton*, 592.

SEE DATIEN EN PAIEMENT, No. 2—*Shultz v. Morgan*, 616.

ATTORNEY AT LAW.

1. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

ATTORNEY AT LAW—Continued.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

But the judgment complained of was rendered also on the written consent of Frank Haynes, her attorney. His authority to consent to the judgment with a stay of execution until a certain specified time has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it.

The attorney was a sworn officer bound by his oath to act correctly in the pursuits of his profession. Thus situated, it is not to be presumed that he acted without proper authority. On the contrary, every presumption is in favor of his having pursued the proper course of conduct, unless the contrary should be suggested on affidavit.

In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular.

M. A. Dockham and Husband v. Jonathan Potter, 73.

2. An attorney at law can not allow claims which the legal representative of the succession, as in this case, never saw or heard of, much less allowed.

Succession of Francois Poussin—On rule of G. W. Banker and T. O. Payan, to destitute the Administratrix, 296.

3. Service of the order to give security was made in this case upon the attorney at law of the testamentary executor, said executor being at the time absent from the State. This is sufficient.

Succession of William Bobb, 344.

4. The right of an attorney to remuneration depends on a contract or appointment, and he can not recover from one who did not employ him, however valuable may be the result of his services to such person.

George Wailles and S. Mathews v. Succession of James N. Brown, 411

5. It is a rule long settled by this court that it will not be implicitly governed in regard to questions relating to the value of professional services rendered by attorneys at law to their clients, by the opinions of legal men taken in evidence, but will be guided by a conscientious estimate of the value of the services performed, and will, of itself, fix the amount, without reference to the opinions of witnesses.

Randolph, Singleton & Browne v. Joseph W. Carroll, 467.

ATTORNEY—CITY.

SEE OFFICES AND OFFICERS, No. 2—*State v. B. F. Jonas*, 179.

ASSUMPSIT.

1. Boudreaux purchased from Delaporte a certain piece of property, giving notes to the order of the vendor and secured by mortgage on the property sold. Afterward, Boudreaux sold to Villiers who, as a part of the price, assumed to pay said notes, one of which in suit herein was then held by plaintiffs. The property thus purchased by Villiers was sold at the suit of the creditors of Boudreaux before the institution of this suit. Under these circumstances, Villiers should not be held to pay the assumpsit, there being a failure of consideration.

Lapene & Ferre v. Delaporte, Administrator, et al., 252.

ASSESSMENT.

1. The opponents to the homologation of the assessment roll presented by the commissioners of the First Draining District err in basing their opposition on the ground that some of the lands upon which the assessment in controversy is established, were drained at their cost under the provisions of Act No. 49 of 1839, and are by the thirteenth section thereof specially and forever exempted from any further assessment for draining. This section created no contract between the State and the opponents, by which their lands were exempted from the assessment under consideration. This assessment is not an *extra tax* within the contemplation of said thirteenth section, which made it the duty of the municipality of New Orleans to maintain the works erected by the draining company on the particular section drained, without ever levying an extra tax on the lands so drained, but only out of the funds arising from the general tax imposed throughout the municipality.

The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1858 and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of the act of 1861.

The Legislature of 1871, in act 30, has legalized the assessments made by the three boards of commissioners under the said acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are now seeking to do.

The State, in ordering the draining, is exercising sovereign power, and can of course direct or authorize the work to be done in such way, and compensation made in such terms, as its discretion may deem best, restrained only by the fundamental principles upon

ASSESSMENT—Continued.

which the government is to be conducted; and nothing is found in those principles inhibiting the State from having the means provided for such a work in the way it is done in the present system of drainage in New Orleans. The existing laws clearly authorize the collection sought to be enforced, and no reason can be seen for judicial interference with the discretion of the State.

In the matter of the Commissioners of the First Draining District, praying for the homologation of the assessment roll, etc., 20.

2. Absence is no excuse for the noncompliance with the requirements of the law and for not objecting, within the proper time, to the assessment roll.

Serrill v. The city of New Orleans, 520.

SEE TAXES AND TAX COLLECTORS, No. 14—*State v. Peter Maxwell, 722.*

BANKRUPTCY.

1. This is a personal action against the owners of a steamboat, the vessel being seized to enforce a lien accorded by a State law, under the conservatory remedy of provisional seizure. It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction.

The State court, having once obtained lawful jurisdiction over the parties and subject matter, could not be subsequently divested thereof by the bankrupt court.

Congress has not only not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee in bankruptcy. This principle applies not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains unascertained.

E. A. Switzer v. John Heinn and Mary Heinn, Owners of the Steamboat Frolic, 25.

2. This suit was brought to revive a judgment *in solido* against defendants, Nelson & Co., serving citation only on Nelson. In bar of the proceeding he pleaded his discharge in bankruptcy. It was a vain thing to cite him, because he could not be held personally liable, and whether or not a judicial mortgage should be perpetuated against the bankrupt's estate by reviving the judgment, was a question that might interest the assignee, the special representative of the ordinary creditors, but it in no manner concerned the bankrupt, who had surrendered his entire estate.

Charles E. Alter v. S. O. Nelson & Co., 242.

3. Factors and commission merchants, when exercising their func-

BANKRUPTCY—Continued.

tions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intendment of the thirty-third section of the bankrupt act of 1867, and are not released from obligations contracted in that capacity by a discharge in bankruptcy.

- To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established that it must be shown that the owner or consignor knew of such custom and usage and assented to it.

J. W. Banning v. E. Bleakley & Co., 257.

4. The judgment of the lower court, predicated upon the ground that the proceedings in bankruptcy in relation to plaintiff in injunction are still pending, and that execution on the defendant's judgment can not legally issue until the final judgment of the bankrupt court decreeing a discharge of the bankrupt, or not, be rendered, is correct.

The defendants made themselves parties to the bankrupt proceedings, opposing the discharge of the plaintiff, and the matter remains undecided in the bankrupt court. He has the right to have the execution suspended until the final action of said court.

O. W. Keeting v. Arthur, Stone & Co., 570.

SEE JURISDICTION, No. 15—*Switzer v. Zeller et als.*, 468.

SEE MORTGAGE, No. 12—*Heard v. Patton*, 542.

BILLS AND PROMISSORY NOTES.

1. The rule is that want or failure of consideration will be no defense or bar to the title of a *bona fide* holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein.

A valuable consideration is one having value or worth, and it is not measured by any particular degree or amount. There must be value, but not necessarily full value, which is not always easily determined. The agreement of the parties must fix the value. A small price is value, and where it is not clearly a sham, must be accepted as valid. In this instance, this court can not say that the willingness of the holder of the notes before maturity to take one hundred dollars for said notes, which were each for \$2500, was, of itself alone, notice to the purchaser of a want of consideration.

W. B. Scott & Co. v. A. B. Seelye, 95.

2. This is a suit on a mortgage note drawn by defendant, and lost in *transitu* from New York to New Orleans, to which latter place it had been sent for collection. The Citizens' Bank of Louisiana

BILLS AND PROMISSORY NOTES—Continued.

offered him a bond of indemnity if he would pay the note at maturity, which he declined. Under this statements facts;

Held—That the defendant is liable for the interest due on the note from the maturity thereof, for counsel's fees, and for the costs of the act of mortgage. He could have avoided them all by depositing, or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default. But he is not liable for the costs of advertisement for the recovery of the lost note, as he can not be made to pay for either the misfortune or the negligence of plaintiff.

Citizens' Bank of Louisiana, for the use of the Phenix National Bank of New York v. John Balis, 106.

3. The Teutonia National Bank was clearly without right to hold Loeb & Co's note, pledged to secure a particular debt of Gretzner, Winehill & Co. on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co. with them, offered to pay and take up the note of the last named parties, the bank upon receiving payment in full for that note should have surrendered the collateral.

Teutonia National Bank of New Orleans v. H. Loeb & Co., 110.

4. Article 313 of the Revised Code and Article 964 of the Code of Practice do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the curator who was not appointed as such until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that, ten days before service of notice of protest, the heirs of the indorser of the note sued upon, had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to the indorser to his son-in-law at the residence of said indorser.

At the time of the protest, no legal representative having been appointed for the indorser, the notice addressed to him and left at his domicile on the day of protest was sufficient to fix his liability. The plaintiff, through the notary, had exercised reasonable diligence and given such notice of protest as under the existing state of facts the law required to be given.

Mrs. Estelle Rosa Weaver v. D. B. Penn. and Alfred Penn, 129.

5. In this case the notes given by defendant for the price of a certain piece of property were made the debt of the firm composed of plaintiff and defendant by the act of partnership and purchase, but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are

BILLS AND PROMISSORY NOTES—Continued.

the individual debt of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm, nor would the payment of said notes out of the interest of each partner in the partnership have such effect.

Jacob F. Wild v. Albert Erath, 171.

6. This is a suit brought against defendant on a note drawn by him, and pledged as security to plaintiff by Carlos, Marks & Co. for the payment of three of their notes. The defense is that the defendant has paid two of the notes, and has tendered the plaintiff the amount of the last one, for which the instrument sued on was given in pledge, it being a note signed for accommodation and without consideration, for the benefit of the pledgora.

The plaintiff knew that the pledge was an accommodation note. In law and equity, therefore, the defendant ought not to be required to pay more than the amount for which the pledge was given, to wit: the three notes discounted by Carlos, Marks & Co., and ought not to be extended to cover money overdrawn by said Carlos Marks & Co. But a formal real tender of the money having not been made as required by law, defendant can not be exonerated from interest and costs.

Mechanics' and Traders' Bank v. J. Barnett, 177.

7. There is no law that authorizes plaintiffs to claim interest on the bills issued by the city as currency; nor is there any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded.

The assent of the Mayor that the plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city.

The rights of the plaintiffs were fixed by a statute. They were authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and can claim no more.

Sam Smith & Co. v. City of New Orleans, 187.

8. The defense that the indorser of a promissory note was released by the fact that the bank, without his knowledge or consent, gave up a warrant which had been pledged as collateral security, must be sustained. The indorser contends very properly that he could have made the warrant available, had it been retained and he required to pay the debt.

Union National Bank v. Cooley and Labatt, 222.

BILLS AND PROMISSORY NOTES—Continued.

9. This is a suit on two promissory notes with mortgage, drawn by defendant, and given as collateral security for advances made in plantation supplies. There is no evidence of fraud or bad faith on the part of the plaintiffs in regard to the possession of said notes, which were negotiable and were transferred by delivery. Gay & Co., it is true, had limited the amount of these advances to \$10,000. But the defendant exceeded this limit, and pretends not to be responsible for said excess. She can not be permitted to take advantage of this act of her own, and Gay & Co. have the right to cause the property mortgaged to be sold so as to satisfy the amount due them for advances made to the defendants.

Edward J. Gay & Co. v. Mrs. Solidelle Deynoodt et al., 249.

10. Beals & Laine are sued as makers and Edward Beals as indorser of a promissory note. E. Beals' son, a member of the firm of Beals & Laine, wrote the name of his father, who can not write, as indorser of said note. The evidence showing that Edward Beals subsequently ratified the act or adopted the indorsement, this is sufficient to bind him as indorser.

George Lysle and Son v. Beals & Laine et al., 274.

11. At the time of the discount of the note which is the subject of the present controversy, Hunter, one of the firm of Callender & Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender, the plaintiff, and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender. If Callender had given him verbal authority, as contended by defendants and intervenors, the authority was revoked before exercised. But, even without a revocation, Hunter had no authority to indorse and discount the note in question.

Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees acquired none, because they had notice of the want of authority in Hunter to indorse and negotiate it.

R. K. Callender v. Golsan Brothers. Jackson & Manson, Warrantors and Intervenors, 311.

12. The motives which influence a person to exercise a legal right do not destroy that right or affect its enforcement.

A valuable consideration may, in general terms, be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side;

BILLS AND PROMISSORY NOTES—Continued.

and if either of these exist, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder.

Milton Benner v. Warner Van Norden et al., 473.

13. The extension of the time of payment of a certain mortgage note was really the consideration of the note in suit, and this was a lawful consideration. *Mrs. M. A. Foster v. Wm. H. Wise*, 538.
14. One holding a note as collateral security or as a pledge, to the extent of his debt, is the owner of the obligation for all practical purposes. It is not shown, in this case, that the debt to be secured is less than the amount of the note, even if it had been shown that plaintiffs held it as a pledge.

The note being negotiable and having been acquired before maturity by the plaintiffs, the equities between the original parties can not be noticed in this suit. When one of the parties must bear a loss, he who has made it possible must suffer.

In this instance, the mortgage is accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the accomplishment; and it follows that the principal obligation, like a shadow, follows its substance.

A mortgage may be given for an obligation which has not yet risen into existence, and the provision of law which says "that the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it," applies only to cases between the parties to the contract, or in which the principal obligation is not negotiable.

L. H. Gardner & Co. v. J. D. Maxwell, 561.

15. The note sued upon was negotiable in form and was the maker's unconditional promise to pay the amount stated therein. When plaintiff received it from Mayer, indorsed "without recourse" on him, he took it at his own risk, and the indorser is not liable because of the defense of Confederate money consideration successfully pleaded by the defendant. The note was given in novation, indorsed "without recourse," and the indorser has not been notified of its dishonor by the maker. Even without this limitation in the indorsement, under the rules of commercial law, the indorser who has not been notified of non-payment at maturity can not be made liable.

B. W. Rayne v. W. L. Ditto. Lazarus Mayor, Warrantor, 622.

16. The defendant was bound as acceptor. No notice of protest was necessary to fix his liability either as surety or acceptor. A loan of money was made by plaintiff to Sturgess, and the draft of Sturgess for that amount was drawn upon and accepted by Leonard to

BILLS AND PROMISSORY NOTES—Continued.

enable Sturgess to get the money he wanted from plaintiff, who, to the defendant's knowledge, would not have loaned the money without security, and who rested upon the defendant's acceptance as securing the amount loaned to Sturgess. Under no aspect of the case can there be any weight in the defense.

J. W. Fuller v. A. H. Leonard, 635.

17. A bill was drawn by A. Flournoy to his own order upon Thurmond and Hicks and Martin Tally, and by them accepted for \$1125, which bill was indorsed by Duncan. Thurmond and Hicks, joint acceptors with Tally, paid on the second February, 1871, one-half of the amount of the bill, principal and interest then due, and were released from further liability by the plaintiff, holder of the bill. He now claims from defendants, *in solido*, Martin Tally, as acceptor, and Duncan as indorser, the remainder due.

The defense, on the part of Tally, that plaintiff should have exhausted his legal remedies against the drawer and the accepters, Thurmond and Hicks, is not tenable under the rules of the law merchant. Tally and Thurmond are jointly bound as between themselves, but each is bound to the holder for the full amount. As to the indorser, Duncan, he is released by failure to serve legal notice upon him of the protest of the bill.

McNabb v. Tally and Duncan, 640.

SEE PARTNERSHIP, No. 5—*Cottam v. Smith & Co.*, 128.

SEE PLEDGE, No. 1—*Davidson & Hill v. Bodley*, 149.

SEE ASSUMPSIT, No. 1—*Lapene & Ferre v. Delaporte*, 252.

SEE PARTNERSHIP, No. 8—*Carrie A. Drake and Husband v. Hays et als.*, 256.

SEE CONTRACT, No. 3—*Chastant v. Elliot*, 322.

SEE TUTORSHIP, No. 4—*Coons v. Kendall*, 443.

SEE PLEDGE, No. 3—*Louisiana Savings Bank and Safe Deposit Company v. Bussey*, 472.

BILL OF LADING.

1. The plaintiff sues defendant for a certain sum of money on a contract of affreightment concerning the transportation of slaves, for which he signed a bill of lading. After signing, he protested against it. This was too late. If his allegations are true, he should not have signed the bill of lading, or if he did, he should have protested at the time.

James S. Rogers v. Robert Roberts, 85.

BOARD OF LIQUIDATORS.

SEE BONDS, No. 10—*State ex rel. Citizens' Bank of Louisiana v. Board of Liquidators*, 660.

BONDS.

1. In this instance the main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court as to discharge one of them, the Delta Newspaper Company, and hold the other two liable jointly and not *in solido*, and therefore the surety is not liable for the amount of the judgment so rendered. The Code of Practice provides that the appellant shall satisfy whatever judgment may be rendered against him, and that the surety shall be liable in his stead. The language used is plain and expressive—that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law. The defense he sets up is more specious than weighty.

Culver, Simonds & Co. v. Leovy, Hart et al, 58.

2. There is no law that authorizes plaintiffs to claim interest on the bills issued by the city as currency; nor is there any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded.

The assent of the mayor that the plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city.

The rights of the plaintiffs were fixed by a statute. They were authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and can claim no more.

Sam Smith & Co. v. City of New Orleans, 187.

3. Until the judgment appealed from be disposed of by this court, which has granted relators a suspensive appeal, the property of the succession being in the custody of the executor and under the control of the parish court, and no moneyed judgment having been rendered against said relators, who do not seek to suspend the execution of any such judgment, it follows, under this statement of facts, that a bond for costs is all that they should be held to give.

State ex rel. Mrs. Charles Pecot et als. v. Parish Judge of the Parish of St. Mary, 231.

4. The indorser of a note having obtained a suspensive appeal from a judgment against him as such, and having given as surety on the appeal bond the maker of the note, against whom a separate judgment was rendered in the same suit, and the parties having severed in their defense;

Held—That in cases previously decided, the sufficiency of such a

BONDS—Continued.

surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

State ex rel. John Coleman v. Judge of the Sixth District Court, parish of Orleans, 234.

5. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

Isaac F. Riley v. Heirs of E. M. Riley, 248.

6. There is a wide difference between the bonds issued in the name of and payable by an important political corporation and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

Where, as in the contract of sale relied on in this instance, payment was made in bonds, it was as if the price had been paid in current money. The language of the contract and of the act itself, on which it is based, implies such an intention, and indicates that it was meant to give a full discharge of the debt, without the reservation of any lien or privilege to secure the bonds at maturity.

Smith & Co. v. The City of New Orleans and Recorder of Mortgages, 286.

7. This is a suit against the succession of John Armstrong, who is alleged to have been security on a bond given by one J. G. Campbell, as secretary and treasurer of the Canal and Claiborne Streets Railroad Company. As there is no sum fixed in the penal clause of the bond, the instrument contains no written promise on the part of Armstrong to pay any particular amount. Therefore his succession is not liable on the bond. As no amount is fixed in said bond, there is no evidence that the parties ever came to an agreement as to the extent of the obligation of Armstrong. The contract was incomplete.

Assuming that the signing and delivery of the instrument authorized or implied authority granted to the holder to fill in the amount—which this court does not admit—the death of Armstrong revoked the mandate and no sum has been filled in.

It has frequently been held that omissions in filling judicial bonds

BONDS—Continued.

are supplied by the law. But in the case at bar the bond is in no sense judicial. It is an ordinary conventional bond given by an officer of a corporation for the faithful performance of his duties, and as the surety promised to pay no specific sum, there is no obligation for this court to enforce.

Canal and Olaborne Streets Railroad Company v. Succession of John Armstrong, 433.

8. It seems settled by our jurisprudence that where no law authorizes the execution of a judicial bond, no force can be given to it. The order of the judge authorizing the intervenors in this case to release property under sequestration by executing a bond, gives no validity to the bond, because there is no law authorizing intervenors to release property under sequestration by furnishing bond.

Annie Alexander and Husband v. B. Silhernagle et al., 557.

9. The relator is the holder, for various persons, of bonds known as the Levee Bonds, and of other bonds issued for "paying certain debts" under the act of fifteenth of February, 1866. He prays for a mandamus compelling the board of liquidators to fund his bonds. Critically considered, he rests his rights so to do upon the sole ground that the act of the Legislature, No. 11, of the session of 1875, is unconstitutional. The issue is made up by the answer of the board, as well as of the State, which denies the validity and legality of the bonds. That issue is, whether the act No. 11, acts of 1875, conflicts with the amendment to the constitution adopted in 1874, and the act No. 3, of the acts of 1874, which this amendment was intended to make irrepealable and unalterable by a subsequent Legislature.

All holders of bonds issued by the board under the act of 1874 are protected in their rights. The Legislature can pass no law affecting their validity; for this would be impairing a contract already consummated.

But the relator has made no contract with the State under this act.

His bonds are not bonds issued under this statute. He asks that bonds be given him in exchange for those he holds.

There is nothing unconstitutional in an act of the Legislature which gives to the citizens of the State the right to see that no claim set up against it shall be passed until the validity thereof is ascertained. There is no violation of any contract with the relator by the act in question, because, at the time the act was passed, no contract existed under the act of 1874 between him and the State. The bonds he holds now are in the same condition that they were prior to the passage of either of the acts now under consideration.

The act No. 11 of the acts passed at the extra session of the Legisla-

BONDS—Continued.

ture of 1875 and approved on the seventeenth May of the same year does not conflict with the amendment to the constitution adopted in 1874, and is therefore constitutional.

The levee bonds in the possession of the relator are valid obligations against the State, and should be funded.

In so far as relates to the bonds alleged to have been issued under the statute approved February 15, 1866, the application of the relator to have them funded must be dismissed on account of a discrepancy in the proof of their issuance which can not be supplied.

State ex rel. Oscar J. Forstall v. The Board of Liquidation, 577.

10. This is a proceeding by mandamus to compel the Board of Liquidators to fund a certain promissory note for two hundred thousand dollars with eight per cent. interest made by the Governor of the State on the twenty-seventh of February, 1872, and secured by a pledge of forty warrants of five thousand dollars each, subject to a credit of \$120,000, amount of bonds received in exchange for said warrants under act No. 3 of 1874, known as the "Funding Act."

The law does not make it the duty of the liquidators to exchange the bonds authorized by act No. 3 of 1874 for anything but the bonds of the State and certain warrants specified in section 3.

Section 3 of said act is the only part thereof that confers authority to make such exchange, and it designates only "all valid outstanding bonds of the State and valid warrants drawn previous to the passage of this act by the respective auditors, except warrants issued in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants."

The words "bonds and warrants" are here repeated to leave no doubt as to the object of the law, and the proviso which immediately follows declares: "That the holder of any bond or warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided for by this act." Therefore only the holders of outstanding bonds and valid warrants can appeal to the courts for relief.

Lest there should be any doubt, section five declares "that the consolidated bonds herein authorized shall be held and used by said Board of Liquidators only for the purpose of exchange as aforesaid"—that is, for the outstanding bonds and valid warrants.

The relator having voluntarily accepted the terms of the law and, taken sixty per cent. of its whole claim against the State by fund-

BONDS—Continued.

ing the warrants held by it, the purpose of the act as to said debt has been attained, and the whole and only debt of the State due to the relator in this transaction has been funded, and the indebtedness of the State, *pro tanto*, has been reduced and restricted according to the intent and object of the act.

State ex rel. Citizens' Bank of Louisiana v. Board of Liquidators, 660.

SEE APPEAL, No. 29—*State ex rel. Temple S. Coons v. Judge of the Superior District Court*, 334.

SURETY, No. 6—*New Orleans, Mobile and Chattanooga Railroad Company v. Dugan*, 465.

BROKERS.

SEE OBLIGATIONS AND LIABILITIES, No. 17—*Todd v. Bourke*, 385.

CARRIERS.

1. The act of the Legislature of Louisiana, No. 38 of the session of 1869, is not in conflict with article 1, section 8, of the constitution of the United States, nor is it in conflict with article 14, section 1, of said constitution. Act No. 38 does not undertake to regulate commerce. The first section of act 38 forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race and color. That is the substance of the section so far as applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States within the limits of Louisiana, from the effects of prejudice against them. It was not in any manner to affect the commercial interests of any State or foreign nation, or of the citizens thereof.

The above mentioned act, No. 38 of the session of 1869, does not violate section 1 of article 14 of the constitution of the United States. No one is deprived of life, liberty, or property, without due process of law by said statute. The position that, because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he pleases, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy.

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not. But the act is in perfect accordance with the constitution of the United States.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law is reasonable.

Mrs. Josephine Decuir v. John G. Benson, 1.

CARRIERS—Continued.

2. The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience according to the passenger's condition in life and the journey undertaken by him, and for such sum as might be deemed necessary for his expenses.

Mrs. Ellen Yemaga Del Valle and Husband v. Steamboat Richmond and Owners, 90.

3. Passengers have the right to require to be set on shore safely while disembarking, and they are not subjected to the hard lot of encountering dangers gotten up by those whose business it is to provide for their safety in leaving the boat. There should be no necessity existing for them to look out, or to jump from one stage to another in order to save life or limb.

Common carriers are bound to carry their passengers safely and securely, and to use the utmost care and skill in the performance of these duties, and, of course, they are responsible for any even the slightest neglect.

The burden of proof is on the defendants to establish that there has been no disregard whatever of their duties, and that the damage has resulted from a cause which human care and foresight could not prevent.

Laurent Julien v. Captain and Owners of Steamer Wade Hampton, 377.

CITATION.

SEE ATTACHMENT, No. 1—*Wooldridge v. Monteuse*, 79.

SEE GARNISHMENT AND GARNISHEES, No. 4—*Dupieris v. Hallisay*, 132.

SEE PRACTICE, No. 10—*Anderson v. Arnette et als*, 237.

SEE BANKRUPTCY, No. 2—*Alter v. Nelson & Co.*, 242.

SEE JUDGMENT, No. 5—*Isaac F. Riley v. Heirs of E. M. Riley*, 248.

SEE JUDGMENT, No. 6—*Alter v. McCullen*, 251.

SEE JURISDICTION, No. 12—*Succession of William Bobb*, 344.

SEE PRESCRIPTION, No. 7—*Nicholson & Co. v. Jennings*, 432.

CHECKS ON BANKS.

1. The check, the amount of which plaintiff, in her capacity of testametary executrix, seeks to recover as having been embezzled by one of the defendants, Mrs. Risley, was not of Hampton Elliott, whose succession she represents, but was a check drawn by Britton and Kountz to the order of said Elliott. The moment Elliott

CHECKS ON BANKS—Continued.

indorsed it and handed it to Mrs. Risley, his property in it ceased. It was not his money which the bank paid when it paid the check after his death. It was Britton and Kountz's money. The bank paid under instructions from them and not under any mandate from Elliott.

A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it.

Mrs. Virginia O. Burke, Testamentary Executrix, v. Mrs. Olarissa Bishop and Mrs. Risley, 465.

CHARTER PARTY.

1. This is a suit to recover the penalties stipulated in two charter parties, for the violation thereof, in relation to voyages to be made by two different vessels.

The putting in default was sufficient as to one of the vessels, but there is no proof that either of the modes for putting in default pointed out in article 1911, R. C. C. No. 2, was observed in relation to the other vessel, until the day the contract expired, when it was impossible for the vessel to execute her voyage on, or previous to, that day. The defendants are therefore liable jointly and *in solido*, as they bound themselves, only for the infraction of the contract as to one of the vessels.

Henry Eden v. F. Lemandre et als., 176.

2. The charterer when he has complete control of the vessel, as in this case, is *pro hac vice* owner, as to parties dealing with him in such capacity, but he is not such in a contest with the actual owners for the value of the vessel and on the terms of the charter party. In such contest the burden is on the owners to prove the negligence of the charterer.

The authorities relied on in this instance by plaintiffs refer to the responsibility of owners as common carriers, and most of them are based on the act of Congress declaring the fact of explosion to be full *prima facie* evidence of negligence on the part of the defendant; while this is an action by the owners against their lessee for the value of the property hired by them to the latter. The evidence on this occasion does not show that the defendant as lessee violated the obligations imposed upon him by article 2710 R. C. C.

George E. Wilkinson and Frank Behan v. Joseph Dalferes and Joshua M. Johnston et als., 379.

CLERK'S FEES.

SEE OFFICES AND OFFICERS, No. 8—*Fitzpatrick v. City of New Orleans, 457.*

COMMUNITY.

1. After the decease of his wife, the plaintiff, administrator of community property, gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux obtained judgment, issued execution, and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale. The record shows that the estate has not been settled up; there are debts outstanding against it besides the one for which the administrator gave his note. Under such circumstances, the seizing creditor could expect only to be paid concurrently with other creditors of the estate in the due course of administration. His proceedings are illegal and irregular.

Lovel Ledoux, Administrator, v. J. E. Breauz, Sheriff, et als., 190.

2. The assets shown as composing the separate succession of Mrs. Clark being her separate property, distinct from the assets of the succession of her husband, the opponent can not claim payment out of these assets for his debt, which is a community debt due by the community estate.

Successions of George and Frances Clark—On opposition to the account of the Executrix, 269.

3. By the marriage contract of plaintiff with her husband, the community was modified so as to exclude the Blackwater plantation and its fruits from the community. This was permitted by article 2421 C. C. The cotton seized was raised on the plantation, and the horses also seized were by destination a part of the Blackwater plantation. Hence the injunction was lawfully taken and must be perpetuated.

Mrs. A. M. Barrow et al. v. J. H. Stevens, Sheriff, et als., 343.

4. This is a suit in injunction prohibiting defendant from suing plaintiff, or foreclosing his mortgage as vendor, and praying for the rescission of the sale of a tract of land, on the ground of defective title.

The plaintiff has failed to set forth a cause of action in her petition.

It has been settled that the surviving husband, the head of the community, may sell community property after the death of his wife. The title of the property, in this instance, stands in the defendant's name on the records of the parish where the property is situated, and he is *personally* bound for the debts of the community. Besides, plaintiff is not disturbed in her possession, or threatened with eviction.

Julia Williams and Husband v. J. W. Fuller, 634.

SEE SUCCESSION, No. 5—*Smith & McKenna v. Charles*, 503.

COMPENSATION.

1. The duties of the defendant, while acting in his official capacity of wharfinger, were fixed by law. Compensation is an equitable remedy, and never takes place when it would be against good conscience. This case is similar to the case of *City of New Orleans v. Finnerty et al.*, previously decided, and must be controlled by the principles therein announced.

City of New Orleans v. E. V. Fassman et als., 650.

2. Compensation takes place between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debt is the same. It can not be opposed by a fiduciary acting in the line of his duty.

There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to said agent.

No officer of a government, State or municipal, is empowered to pay himself his salary or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words, he can not pay himself.

The Administrator of Commerce for the city of New Orleans had no power to authorize the defendant, a wharfinger for the second district of said city, to retain a sufficient sum out of the moneys collected by him to pay his salary and also other employes in the office, and expenses of office. That the same thing has been done in other instances is no justification. Custom can not supersede the law in such cases. If it be a custom, it is a vicious one.

City of New Orleans v. Martin Finnerty, 681.

CONTRACT.

1. Where the terms of the contract for building were, that "no extra was to be admitted or allowed for, unless executed under written authority, and all omissions, additions or alterations should be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an indorsement, or no allowance for the same shall be made by the other party."

Held—That certain items of extra work claimed by plaintiff, could not be proved by parol evidence under the contract, and second, because they were outside of the contract, in no manner connected with the specifications in the contract, and contrary to the allegations in the petition.

John Page v. Nicholson & Co., 116.

CONTRACT—Continued.

2. The difficulty in this case arises from the loss of a counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. The bills of exceptions as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

An unreasonable contract is not to be supposed probable. It is not to be presumed that plaintiffs, who were merchants and business men, would have consented to advance large sums of money to cultivate a plantation for defendant's benefit, and themselves incur all the risks and losses attending the enterprise if not successful.

Payne & Harrison v. Mrs. H. A. Stackhouse, 185.

3. In this suit, instituted by plaintiff, the nullity of the proceedings of defendant in Iberville against plaintiff, is set up on the ground that plaintiff was an absentee, was not cited and had no knowledge of the suit brought against him there. Whether the proceedings in Iberville were regular or not is immaterial, inasmuch as plaintiff makes at the domicile of defendant the issue of the validity of the sale by defendant to him and prays judgment decreeing him to be the owner of the object sold.

The mules, which are the subject of this controversy, having been sold to plaintiff upon his promise to pay for them by a note well indorsed, payable at one year from date, bearing interest and being equivalent to cash, and after the shipping of the mules by the vendor according to the directions of the plaintiff, the latter having delivered to said vendor a note, both the drawer and indorser of which were insolvent at the time, thus making said note utterly worthless to the knowledge of plaintiff, the consideration of the contract fails and the sale must be annulled and set aside.

John Chastant v. Joseph Elliott, 322.

4. There was a total failure on the part of defendant to deliver at Havana, island of Cuba, certain articles contracted for. The interference of the military power of the government at the time has relieved him from the stipulated penalty in case of failure, but he must return the portion of the price received by him for the articles not delivered.

J. Denny v. H. Simons, 438.

SEE BOND, No. 7—*Canal and Olaiborne streets Railroad Company v. Succession of Armstrong*, 433.

CORPORATION, No. 4—*City of Shreveport v. Mary M. Waples and Husband*, 636.

CONSTITUTION.

1. The act of the Legislature of Louisiana, No. 38 of the session of 1869, is not in conflict with article 1, section 8, of the constitution of the United States, nor is it in conflict with article 14, section 1, of said constitution. Act No. 38 does not undertake to regulate commerce. The first section of act 38 forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race and color. That is the substance of the section so far as applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States within the limits of Louisiana, from the effects of prejudice against them. It was not in any manner to affect the commercial interests of any State or foreign nation, or of the citizens thereof.

The above mentioned act, No. 38 of the session of 1869, does not violate section 1 of article 14 of the constitution of the United States. No one is deprived of life, liberty, or property without due process of law by said statute. The position that, because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he pleases, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy.

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not. But the act is in perfect accordance with the constitution of the United States.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law is reasonable. *Mrs. Josephine Decuir v. John G. Benson*, 1.

2. The second article of the city ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans, approved February 11, 1853, which provides, "that from and after the first of January, 1855, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as stated in said ordinance," is not in conflict with the provisions of the constitution of the United States.

J. W. Cannon v. City of New Orleans, 16.

3. Under a title to make appropriations for the general and current expenses for the year ending thirty-first of December, 1874, an appropriation for an expense or debt incurred prior to that time

CONSTITUTION—Continued.

can not be made, because the object is not expressed in the title, as required by article 114 of the constitution.

Besides, the claim of plaintiff can not be enforced, because at the time it was incurred, the total debt of the State exceeded the limit fixed in the amendment of the constitution.

State ex rel. Wm. W. Howe v. Charles Clinton, Auditor—State of Louisiana, Intervenor, 40.

4. The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and void. It is true, the right of the plaintiff to make and vend gas will begin on the first of April, 1875, but the right to sell shares of its capital stock, to the amount of three millions of dollars and the duty to erect works, buildings, machines, lay gas pipes, and prepare every thing necessary to begin the enterprise or business, vested the moment the corporation began.

A void title set up to defeat plaintiff's right to prepare for their business, invades their charter as effectually as if set up to obstruct the business after it had begun.

This is not an action of damages under article 2315 of the Revised Code. The plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, article 21. The exception to the petition of plaintiffs on the ground that it discloses no ground of action can not be maintained.

Orescent City Gaslight Company v. New Orleans Gaslight Company, 138.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first of April, 1875, is no more disclosed in the title of the act, entitled "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending gas is indicated therein. The prolonging of defendant's corporation for twenty years virtually gives a new charter for that period. Moreover, the title is deceptive and calculated to mislead the mind from the true object of the statute. Hence, the statute is repugnant to article 115 of the constitution of 1852 then in force and is therefore void.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895, and the act of March 1, 1860, which had that object in view, being unconstitutional, was utterly void from the beginning.

The act incorporating the plaintiff's company, conferring on it the

CONSTITUTION—Continued.

sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years from the first of April, 1875, is not repugnant to article 114 of the constitution of 1868 then in force, requiring the object or objects of every law to be embraced in the title. The object of the act, as stated in the title was: "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges. These powers and privileges need not be detailed. The title of the act disclosed the creation of a gaslight company. This was sufficient to cover the monopoly or exclusive privilege to make and vend gas.

An exclusive privilege or monopoly, can be granted under the usual title to incorporate a company. The grant of the monopoly explained of in this case does not violate the constitution, and is valid. *Ibid*, 138.

The State, intervening, not to set up some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant, in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing the intervention.

In regard to the intervention of the city of New Orleans, the right reserved by the State for it to become the purchaser of the gas works, fixtures, etc., at the expiration of the charter of the defendant, was not such a vested right that the State could not withdraw or recall, without contravening that provision of the constitution of the United States prohibiting a State from impairing the obligations of a contract.

Even conceding that the authority given to the city, if she saw fit, at the expiration of the defendant's charter, to purchase the gas works, by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived, and the grant of the right and exclusive privilege to plaintiff to make and vend gas, is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. This grant by implication revokes or recalls any previous authority given the city to buy the gas works of defendant on the first of April, 1875. This is violating no contract protected by the constitution of the United States. The intervention of the city can not be maintained. *Ibid*, 183.

5. It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school, or charitable purposes,

CONSTITUTION—Continued.

by implication prohibits the General Assembly from exempting property not actually used for such purposes.

The exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State. It means a complete, and not a partial exemption, and this limitation must apply to the power of taxation previously delegated to the municipal corporations of the State.

Mr. and Mrs. Lefranc v. City of New Orleans, 188.

6. The only objection urged by plaintiff to the sale in this case is that the price was paid in Confederate money.

There are three grounds fatal to the objection :

First—The contract by which the defendant acquired the property in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868.

Second—The plaintiff, by receiving \$350 of the proceeds in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—The plaintiff can not keep the price or any part thereof, and claim the thing sold. *Sarah S. Tilsen v. Catharine Haine*, 228.

7. The joint resolution of the Legislature upon which defendant relies in this case and the title of which is: "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama," sufficiently discloses the object of the resolution. It is not therefore unconstitutional.

The city of New Orleans v. New Orleans, Mobile and Chattanooga Railroad Company, 414.

8. The mayor and selectmen of the town of Homer could not do any thing which they were not authorized to do by the statute from which they derived their powers, and this statute expressly prohibited them from imprisoning any person for any period beyond the time necessary for the offender to become sober, or until he should desist from violence. Therefore the ordinance which extends the imprisonment to ten days is illegal, and when the mayor sentenced the defendant to an indefinite imprisonment, that is, until he paid a certain fine, his judgment was doubly wrong, for it condemned under an illegal ordinance, and went much farther than the ordinance itself permits.

As the act of the Legislature under which the ordinance under consideration was enacted, was passed in 1874, its constitutionality must be tested by the constitution of 1868. Constructing together articles 73, 89, 94 of that constitution, it follows that the ordinance

CONSTITUTION—Continued.

under which this action is brought, is illegal and unconstitutional, so far as it permits the mayor of Homer to imprison the defendant as he did, but not so far as it allows him to impose the fine which he fixed.

The Mayor and Selectmen of the Town of Homer v. John B. Blackburn, 544.

9. The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the exemption from taxation, and there is no conflict with the constitution in levying the present tax.

City of New Orleans v. Metropolitan Loan, Savings and Plodge Bank, 648

SEE TAXES AND TAX COLLECTORS, No. 4—*City of New Orleans v. Caselar*, 156.

SEE HOMESTEAD, No. 5—*William Doughty v. Sheriff et als.*, 355.

SEE TAXES AND TAX COLLECTORS, No. 10—*City of New Orleans v. Bank of Lafayette*, 376.

SEE MORTGAGE, No. 8—*Mathilde Morrison v. Citizens' Bank et als.*, 401.

SEE MARKETS, No. 1—*City of New Orleans v. James Stafford*, 417.

SEE BONDS, No. 9—*State ex rel. Forstall v. Board of Liquidators*, 577.

SEE OFFICES AND OFFICERS, No. 13—*State v. Pete Phillips*, 663;
AND No. 14—*State v. George Fritz*, 689.

CORPORATIONS.

1. The rule seems to be that the powers of all corporations are limited by the grants in their charters and can not extend beyond them. But, if to provide for the relief of the indigent, who are unable to procure for themselves the needs of suffering humanity, is an essential part of municipal government, the right to determine the means, form and manner of extending the relief according to the exigencies of each particular case, must exist also. In this case, two policemen, who had been severely wounded in the discharge of their duties by gun shots, and who were poor and destitute, had applied to the City Council for assistance. If the council had power to provide for them at all, it surely had the power to provide the assistance most needed—that of the services of a skillful surgeon. *Samuel Logan v. City of New Orleans*, 101.
2. The title to the act No. 7 of the extra session of 1870, is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and, as a consequence, the prescribing of the city limits or boundaries.

CORPORATIONS—Continued.

Cities may properly be extended in their boundaries as need or convenience may require. The extension of their boundaries may, as in the present case, include rural districts, the condition of which is very materially different from the character of city property.

Taxation must be equal and uniform, but the ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least a difficulty that is never clearly and satisfactorily removed.

The principle is well settled and the doctrine established, that a Legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike.

The tax in dispute in this case has been imposed since the city charter of 1870, which makes it the duty of the City Council to lay an equal and uniform tax upon all real and personal property in said city.

From these well settled principles and the law applicable to this case, it must be concluded that the objections urged against the constitutionality and legality of the tax in question are untenable.

City of New Orleans v. Pierre Caselar, 156.

3. The municipal corporations of this State are permitted to subscribe for stock of railway companies on certain conditions. In this instance, no ordinance whatever, in compliance with these conditions, was passed by the City Council of Shreveport, but, on motion, the proposition of a certain railroad company, to have a vote of the people taken for a subscription to the stock of the company to the amount of three hundred thousand dollars, was referred to the Mayor with authority to order an election. This could not be done. Therefore the acts of the Mayor in the matter were unauthorized and illegal, and could not impose any duty or obligation on the officers of the municipal corporation.

• *State of Louisiana ex rel. W. S. Haven, President, etc. v. The City of Shreveport*, 623.

4. The contract for macadamizing Commerce street in the city of Shreveport was awarded to the undertaker on the third of May, 1871, and the assessment to pay for the work was ordered on the eighth of that month. These acts were done under the authority conferred by the act of the Legislature of March 9, 1869.

But the law establishing the new charter of the city of Shreveport was approved by the Governor on the twenty-seventh of April, 1871, and went into effect from and after its passage. The council deriving its powers from the act of 1869, in virtue of the constitutional provision on that subject recognized by the 21st section of

CORPORATIONS—Continued.

the new charter, held over and remained in office until the organization of the new council to be appointed under the new charter; but it was, from and after the passage of the act of twenty-seventh April, shorn of the powers it previously possessed under the law of 1869. From and after the passage of the act of twenty-seventh April, 1871, it could only exercise the powers granted under that act, and these did not authorize the contract and assessment made in May, 1871.

City of Shreveport v. Mary M. Maples—City of Shreveport v. F. P. Stubbs—Consolidated, 636.

SEE PRIVILEGE, No. 4—*Orescent City Gaslight Company v. New Orleans Gaslight Company*, 138; AND NOS. 9 AND 10—*Same Smith & Co. v. City of New Orleans et al.*, 286.

SEE ACTION, No. 10—*John Wolf v. City of New Orleans*, 309

SEE LIBEL, No. 3—*Benito Vinas v. Merchants' Mutual Insurance Company of New Orleans*, 367.

SEE FIREMEN'S CHARITABLE ASSOCIATION, No. 1—*Teutonia Insurance Company v. Thomas O'Connor et als.*, 371.

SEE TAXES AND TAX COLLECTORS, No. 11—*H. Galley v. L. Guichard*, 396.

SEE SALES, No. 15—*Edwards v. Fairbanks & Gilman*, 449.

SEE MORTGAGE, No. 11—*Consolidated Association of the Planters of Louisiana v. Mason et als.*, 535.

SEE CONSTITUTION No. 8—*Mayor and Selectmen of the Town of Homer v. John B. Blackburn*, 544.

CRIMINAL LAW.

1. Before the jury was impaneled, defendant objected through his counsel to the impanneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court *a qua* erred in overruling the objection and proceeding to trial.
State of Louisiana v. Joe Guidry, 206.

2. There can no judgment be passed, when there was no arraignment. The arraignment is the issue made, and when there is no issue, there can be no trial. This absolute requirement of the law is not cured by the fact that the accused was brought into court and tried without objection.

State of Louisiana v. Chapman Epps, 227.

3. In this case no sentence having been pronounced, and no fine imposed in the court *a qua*, the plea to the jurisdiction of this court, founded on article 74 of the constitution, must prevail.

The State of Louisiana v. Matilda Brown, Martha Brown and Chapman Epps, 236.

CRIMINAL LAW—Continued.

4. The coroner's inquest being signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner, who is a sworn officer, his certificate of the signatures of the jurors is sufficient.

State of Louisiana v. William Evans, 297.

5. Act 124 of the acts of 1874, organizing the Superior Criminal Court, gave that court exclusive jurisdiction of this case, and no order of transfer or other decree was necessary to give it jurisdiction.

If a *nolle prosequi* was entered on the first count for "forgery," the forged order was copied in the second count "for publishing as true a forged order for the delivery of goods," and no explanatory averment of the meaning of the words and figures thereof was necessary—the meaning being obvious. The signature of the forged order "Randal & Co., 43 Carondelet street," was sufficient to suggest the name of a firm upon whom the forgery was committed.

It was not necessary to allege that Randal & Co. had goods at the place designated in the forged order.

The averments of the second count were ample to apprise the defendant of the charge against him, and to put him in possession of all information necessary to prepare his defense.

That a new trial and *nolle prosequi* were entered on the first count charging forgery, is no reason why the defendant should escape the verdict and sentence on the second count for a distinct and separate offense.

The new trial and *nolle prosequi*, as to the first count, were entered on the twenty-third of May, 1874; the motion in arrest of judgment, however, was not presented until the twenty-seventh, four days afterward. This court is not prepared to say that the judge *a quo* erred in holding that the motion came too late.

The expression in the decree of the court that "the prisoner having been brought into court, and having nothing to say in arrest of judgment, was sentenced," etc., of course, implies that he was asked if he had anything to say why sentence should not be pronounced against him.

State of Louisiana v. George Frits, alias George Frey, 360.

6. In reply to questions propounded by the judge to the juror, he said that the opinion he had referred to on his *voire dire* as having been formed at the time of the occurrence was not an opinion, but an impression which would readily and easily yield to evidence (strong evidence), and that he could go into the jury box and render a verdict according to the evidence in the case, regardless of the impression referred to by him. The objection by the

CRIMINAL LAW—Continued.

defendant to this juror was not well founded; the juror was not disqualified.

There was nothing defective in the manner of sentencing the accused. The record shows that, having been brought into court, "and having nothing to offer in arrest of judgment," he was sentenced. This sufficiently shows that he was asked if he had anything to say why sentence should not be pronounced against him.

It was not necessary that the defendant should be present when the motion for a new trial was made and overruled.

State of Louisiana v. Joseph Hugel, 375.

7. The record shows the accused was present during the trial, that he was arraigned and pleaded not guilty. Nothing more was necessary.

The transcript, which is very badly made up, does not show that the accused was asked if he had anything to say why judgment should not be pronounced against him. It is not considered that this ceremony is necessary, though usual and perhaps prudent, in cases not capital.

The regular *venire* drawn for the term was set aside on the objections urged by defendant, that it had been drawn under the act of 1873 instead of that of 1868, and the special *venire* shows that it was drawn under an order of the judge commanding the same. The defendant's objection to the drawing of the jury can not be maintained.

The refusal of the judge *a quo* to permit the accused to contradict the official acts of the clerk by his parol evidence was proper.

State v. Ned Taylor, 393.

8. It sometimes happens that the prosecution, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly. In such case, according to legal authority, if no evidence whatever be given to affect a person thus unjustly made a defendant, the judge in his discretion may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony.

From this authority, as laid down, the inference would seem to be that, when the judge considers the evidence of sufficient weight to question the innocence of the parties sought to be made witnesses for the principal defendant, he should not order their acquittal. The ruling of the judge *a quo* in this case is in conformity with this doctrine, and must therefore be maintained.

State v. Gustave et als., 395.

9. The judge *a quo* was asked to charge the jury that "if the jury believed that the defendant Hamilton was handcuffed at the time

CRIMINAL LAW—Continued.

he was presented to the deceased for recognition, then such recognition was not made in conformity to law and must be rejected."

The judge did not err in refusing the charge. The fact that the defendant may have been handcuffed could have no effect upon the ability of the party wounded to recognize him.

The State of Louisiana v. Henry Hamilton, 400.

10. The prisoner was charged with having forcibly entered a certain house in the night time, armed with a dangerous weapon, with the intent to kill. He was found guilty of everything he was charged with, except that he was not armed with a dangerous weapon. The verdict is therefore responsive to the indictment, and a valid sentence could be rendered thereon. The two sections of the Revised Statutes, 850 and 851, form but one law.

The State of Louisiana v. Jacob Morris, 480.

11. Alcee Harris and Toney Nellum were indicted for murder. No severance was asked by either of the defendants. On the trial evidence of confession by Nellum was offered against him, not objected to, and received. The position taken by Alcee Harris that it involves her in the crime, that it was hearsay, and therefore not admissible, can not be maintained. The evidence was only offered against Nellum and admitted as to him. It was not, under the instructions of the judge, used against Alice Harris. Hence she can not complain. It must be presumed that the jury followed the instructions of the judge.

Both defendants moved for a new trial, which was refused. As no question of law is presented in either of these motions, this court can not consider the legality of the judge's rulings upon them.

The word *willful* is not sacramental, and its omission in the indictment does not vitiate that instrument. Defendants are charged with having feloniously murdered the deceased. The felonious murdering was necessarily a willful act. Whether it was willful and felonious were questions of fact which it was the province of the jury to decide.

The State of Louisiana v. Alcee Harris and Toney Nellum, 572.

12. There is no law of this State, nor any authority under our jurisprudence, requiring a more definite description in an indictment for stealing money than the word itself imports.

The State of Louisiana v. Charles Green, alias Henry Green, 598.

13. Where a witness declared that he had formed an impression based on newspaper statements and that said impression would give way to evidence, that is no cause for challenge.

The judge *a quo* properly rejected the following question to a witness: "You have stated that the accused received in his youth sev-

CRIMINAL LAW—Continued.

eral injuries upon the head; you have stated also that his language and conduct were at times strange and extraordinary. Was that conduct and language that of a rational man?" The facts in regard to the language and conduct should have been detailed.

The following charge to the jury, which was objected to, is undoubtedly correct:

"The killing once proved, the burden of extenuation and of showing all circumstances of accident, misfortune, or justification are thrown upon the defendant. When insanity is pleaded in defense of a criminal act, it must be clearly shown that it existed at the time of the commission of the act. Every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jurors that the party was insane at the time of the commission of the offense. Drunkenness is no excuse for crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts."

The judge *a quo* did not err when refusing to charge the jury as follows:

"If the defense to an indictment is insanity, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the prisoner was sane when he committed the act, and if the jury entertain any doubts of his sanity, they must acquit him of guilt." The burden of proof is upon the party setting up the defense.

The judge *a quo* did not err when refusing to charge: "That, where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors."

The court below did not erroneously refuse, as alleged, to instruct the jury, "That, if some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible." The instruction was calculated to mislead the jury.

There is no error, as assigned, because the record fails to disclose "the names of the grand jurors by whom the indictment was found, the time and place at which the jury was formed, and whether the indictment was formed by twelve or more." In the record is found the following copy of the minutes of the court:

"The grand jurors duly empaneled and sworn in and for the body of the parish of Orleans appeared this day into court, and being called, retired to consider upon the business laid before them; they afterward returned into court and presented the following bill of indictment." This is sufficient.

CRIMINAL LAW—Continued.

There is no error, as assigned, because "the record fails to show that the defendant was asked if he had anything to say why sentence of the law should not be pronounced on him." The remark in the decree, "and having nothing to offer in arrest of judgment," of course implies that the defendant was asked if he had anything to say why sentence of the law should not be pronounced on him.

It is unimportant and no error that the record fails to show "that the prisoner was present in court when the motion for a new trial was made and refused."

The objection that the court allowed the Attorney General, after announcing that the evidence in behalf of the State was closed, to offer another witness, is without weight. It was within the discretion of the judge.

State of Louisiana v. Edward Coleman, 691.

DAMAGES.

1. It is true that the *allegata* and the *probata* must agree, but it is sufficient if the substance of the issue be proved. The real substance in this case is not where the plaintiff was, to a mathematical precision, when he was injured; but first, whether he did suffer, and secondly, whether, if he suffered, it was from the fault of the defendant.

But where the conduct of the plaintiff has been negligent and has contributed to the injury received, he can not recover, even though the defendant be in fault, and such is the fact in this instance. The damage done to plaintiff was in part the result of his own carelessness. He can not therefore make the railroad company responsible for a disaster which he brought to some extent upon himself.

Johnson v. Canal and Olatiborne Railroad Company, 53.

2. A motion to dismiss an appeal on the ground that it is frivolous can not prevail, although it may be a good one for giving damages when the case shall be tried on its merits.

A party may obtain judgment on motion after ten days notice.

Henry Reiners v. Valentine St. Ocran—S. D. Maxwell, Surety on Appeal Bond, 112.

3. The purpose of the laws is clearly, that the work of constructing, repairing and strengthening the levees shall be done under plans, surveys, measurements and directions to be furnished by a board or commission of engineers, for the appointment of which the law provides, and the Louisiana Levee Company will not be held responsible in damages to individuals except in certain cases and according to the provisions recited in section 5 of act No. 4, of the acts of 1871, page 33.

N. Louque v. Louisiana Levee Company, 134.

DAMAGES—Continued.

4. The city is not responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

Spalding v. City of Jefferson, and Purdon v. The City of New Orleans et als.—Consolidated, 159.

5. In this case the act of the officers of the city and the men in their employ being a trespass upon plaintiff's property, for this the law holds the corporation liable. A judgment in favor of the city of New Orleans, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decree.

The Pontchartrain Railroad Company v. The City of New Orleans, 162.

6. This is a claim for damages for the illegal attachment of the plaintiffs' vessel in the suit of Sibley, Guion & Co. v. Fernie Brothers & Co. There was no just ground for seizing this vessel as the property of Fernie Brothers & Co., but there is some difficulty in fixing the damages to which plaintiffs are entitled. The true standard seems to be the expenses incurred and profits lost as the direct consequence of the seizure and detention and as far as they are ascertainable on the part of the plaintiffs.

The British and American Steamship Navigation Company, Limited, et al. v. Sibley, Guion & Co. et al., 191.

7. In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment.
8. There can be no damages awarded for an illegal arrest, unless the same was maliciously procured.

Charles Joseph Gourgues v. Charles T. Howard et als., 339.

9. The act by which the plaintiff suffered was not done by any one for whom the defendant is responsible, under his direction, or in the usual course of his employment. He can not therefore recover.
10. The plaintiff claims damages from the defendants on the ground that they have located their railroad so near his dwelling as virtually to destroy its usefulness to him for the purpose for which it was built.

It is a valid defense that defendants were authorized by the Legislature and the City Council to place their track where they did.

Dominick Koelmel v. New Orleans, Mobile and Chattanooga Railroad Company, 442.

DAMAGES—Continued.

11. This suit is instituted by the husband of the deceased and the father of her child, a minor, against the defendant, a druggist, to make him responsible in damages for the death of this woman, the allegation being that the prescription was improperly compounded. The damages are claimed in his name and that of his child. His damages, if he is entitled to any, is the amount expended by him for medical and other services subsequent to the giving of the noxious enema and for the funeral expenses. The right to damages on the part of the child is that which he inherits from his mother.

The defendant's exception to plaintiff's demand, on the ground that the petition disclosed no cause of action, was a peremptory one and could be pleaded at any time during the progress of the trial. The grounds on which the exception rested were, that it was not alleged that the damage complained of was suffered through the *fault* of the defendant, and such allegation is necessary before that *fault* could be proved; and also, because plaintiff did not state that defendant, as employer, might have prevented the act which caused the damage, and did not do it.

Defendant excepted to the order allowing plaintiff to amend on the aforesaid points. The exception can not be maintained. Amendments are always allowed in the discretion of the court.

The demand is the test to interrupt prescription, and not the sufficiency of the allegations which support it.

If the allegations were sufficient to imply fault on the part of defendant, the use of the very *word* itself was not necessary to fix the responsibility on defendant. If he could have prevented the act, as is alleged, and did not, he was necessarily in fault.

The clause in which plaintiff, as tutor of the minor, claimed ten thousand dollars damages suffered by said minor personally, in the loss and deprivation of the care, education, assistance and love of his mother was, on motion, properly struck out by the judge *a quo*.

The action, so far as the minor is concerned, is the right of action which his mother had against the defendant for the suffering that was caused her by the defendant's employe, and which he inherited. He has no claim against him for the loss which he suffered through his mother's death.

The judge *a quo* erred in striking out the clause in which plaintiff, in his individual capacity and on his own behalf, claims damages for actual expenses, loss of the assistance and services of his wife in business, and for personal sufferings in mind for the loss of his wife, caused by said criminal mistake. Defendant is responsible

DAMAGES—Continued.

for all the expense and damage which plaintiff suffered subsequent to the giving of the enema.

Defendant's objection on the ground that the certificate of death given by the physician states that the woman died of yellow fever, and that the plaintiff caused it to be published in the newspapers, is not well founded. In so far as the certificate is concerned, that was no act of the plaintiff's. As regards the notice, she might have died of the yellow fever, and still her death from that disease might have been caused by the enema. Although very ill, the deceased had at least one chance for her life, which was taken away by the fatal ministering of a violent substance.

Although absent from the city, the defendant was nevertheless responsible for the act of his servant. Admitting the competency of the servant, the responsibility of the employer would be none the less. *William McCubbin, Tutor, v. Samuel Hastings, 713.*

SEE CONSTITUTION, No. 1—*Decuir v. Benson, 1.*

SEE JURY, No. 1—*Sauvinet v. Walker, 14.*

DATION EN PAIEMENT.

1. On the thirty-first of January, 1872, John Eaton made to his wife a *dation en paiement*. On the sixth of February, 1872, the plaintiffs obtained a judgment against Eaton on a debt which was contracted before the *dation en paiement*. The donation by him to his wife of certain checks, mentioned in his contract of marriage, was perfected by the marriage. The money collected by the husband from the banks on said checks, as well as the price of a slave mentioned in said contract of marriage as belonging to the wife, was her property, for which she had a mortgage on her husband's property to secure its restitution. Before any other mortgage in favor of the plaintiffs had attached to said property, he gave it to his wife in payment of the said sum due to her. This giving in payment was lawful.

The property thus given to the wife by the future husband was *extra dotal*, because the title of the wife was not indefeasible until the marriage was consummated.

Article 2335 C. C. declares that the separate property of the wife is divided into *dotal* and *extra dotal*. In this case it is immaterial whether the checks aforesaid were *dotal* or *extra dotal*. In either case the wife had a mortgage on the property transferred to her, and the creditor was not injured, as it is admitted that the price for which the property was transferred to the wife is a fair and full price.

Had the husband been insolvent when the *dation en paiement* was made, that fact would not have prevented the giving in payment,

DATION EN PAIEMENT—Continued.

to replace the wife's paraphernal property alienated during marriage.

There is no force in the objection that the wife assumed the payment of a mortgage which the Citizens' Bank had on the property transferred to her. She took the property *cum onere* in payment of her claims. The plaintiffs, at least, have no interest in raising this objection.

B. Newman & Co. v. John Eaton and wife, 341.

2. It is of the very essence of the *dation en paiement* that delivery should actually be made.

Neither a sale nor a *dation en paiement* can avail against an attaching creditor when there has been no delivery.

In this instance the intervenors were fully aware of the indebtedness of the defendant to the plaintiff at the time the defendant became indebted to them, and of his failing and insolvent condition at that time; and under this state of facts they may well be considered as having aided the defendant in his fraudulent designs to defraud the plaintiff's claim, first by taking a mortgage from defendant on his property, and subsequently by transfers of that property only a few days before the plaintiff's attachment was levied on the same property.

J. P. Shultz v. Joseph Morgan. John Chaffe & Brothers, Interveners, 616.

DOMICILE.

1. The defendant objected to the jurisdiction of the court below on the ground that he was, as alleged in the petition, a citizen of the State of New York. A citizen of that State can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile; for the reason that, in so far as this State is concerned, he has no domicile.

Perkins & Billiu v. Charles Morgan, 229.

DRAINAGE.

1. The opponents to the homologation of the assessment roll presented by the commissioners of the First Draining District, err in basing their opposition on the ground that some of the lands upon which the assessment in controversy is established were drained at their cost under the provisions of Act No. 49 of 1839, and are by the thirteenth section thereof specially and forever exempted from any further assessment for draining. This section created no contract between the State and the opponents, by which their lands were exempted from the assessment under consideration.

DRAINAGE—Continued.

This assessment is not an *extra tax* within the contemplation of said thirteenth section, which made it the duty of the municipality of New Orleans to maintain the works erected by the draining company on the particular section drained, without ever levying an extra tax on the lands so drained, but only out of the funds arising from the general tax imposed throughout the municipality.

The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1858 and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of the act of 1861.

The Legislature of 1871, in act 30, has legalized the assessments made by the three boards of commissioners under the said acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are now seeking to do.

The State, in ordering the draining, is exercising sovereign power, and can of course direct or authorize the work to be done in such way, and compensation made in such terms, as its discretion may deem best, restrained only by the fundamental principles upon which the government is to be conducted; and nothing is found in those principles inhibiting the State from having the means provided for such a work in the way it is done in the present system of drainage in New Orleans. The existing laws clearly authorize the collection sought to be enforced, and no reason can be seen for judicial interference with the discretion of the State.

In the matter of the Commissioners of the First Draining District, praying for the homologation of the assessment roll, etc., 20.

2. According to the provisions of the several statutes of the Legislature creating and regulating the duties of the drainage commissioners for the city of New Orleans, to whose rights and duties the respondents have succeeded, it is the ministerial duty of the respondents to collect the assessments and judgments for drainage taxes, in time to meet the payment of the warrants to be issued to the Mississippi and Mexican Gulf Ship Canal Company by the Administrator of Accounts for work done by said company, and a mandamus will lie to compel the performance of this duty.

As to the objection that the relator could not acquire, and the Mississippi and Mexican Gulf Ship Canal Company could not assign their franchises to him, it is one which the respondents are without interest to raise. The transfer, whether in pledge or in full property made to him by said company, has been recognized by the

DRAINAGE—Continued.

- Legislature in act 22 of the acts of 1874, proposing an amendment to the constitution limiting the debt of the city of New Orleans, and it is now a part of the organic law of the State. After such a transfer, thus recognized by the State, the respondents can certainly raise no objection to said transfer.

State of Louisiana ex rel. Warner Van Norden v. The Mayor and Administrators of the City of New Orleans, 497.

3. If the proprietor below erects a dam or any other thing which obstructs the natural drainage of the estate above, he can be compelled to remove the obstruction and to pay damages sustained on account thereof. *Bowman et als. v. The City of New Orleans*, 501.
4. Act No. 30 of the acts of 1871, entitled "An act for the drainage of New Orleans," does not repeal the act of 1858, which provides for leveeing, draining and reclaiming swamps in certain portions of the parishes of Orleans and Jefferson. It only changes, in some degree, the mode by which the drainage is to be accomplished and the means to be applied, but the act itself still stands.

The main reliance of the plaintiffs is, that the lands belonging to them have not been and will not be benefited by the drainage works which are now in progress. But this allegation is not supported by the testimony of the witnesses.

The New Orleans Canal and Banking Company v. City of New Orleans, 505.

ELECTIONS.

1. On the trial in the court *a qua* the defendants severally claimed in vain the right to challenge ten jurors under the act of 1855. If it was ever contemplated that several plaintiffs claiming different offices could unite to bring one suit against several defendants, it is manifest from the unambiguous language of the law in regard to contested elections that each defendant would have the right which was claimed and which was refused.

Taking as true what the defendants admitted, to avoid a continuance: "That the election returns of the parish were not made out and sworn to as the law requires, and that the ballots for ward one will not show the same result as to the returns, this would not be sufficient to defeat the parish election. It has often been decided that the failure to comply with the directory clauses of an election law will not annul an election. Courts can not affix to the omission a consequence which the Legislature has not affixed.

There is an essential difference between the act of voting and the police provisions to secure the evidence of the act. If the votes be deposited, the object of the election is attained, and its validity

ELECTIONS—Continued.

can not be affected by the non-observance of the directory provisions.

If the sworn statements be true, that the ballots and returns in the ballot boxes which were called for and could not be procured have been tampered with so as to render them unreliable as evidence, the result of the election, as ascertained and announced by the commissioners of election at each precinct, might have been proved by the next best evidence in existence.

The irregularities shown by the evidence to have existed, resulted from a want of information on the part of the officers of the election, and said irregularities do not in any manner affect the result of the election in the parish.

The fact that the ballot-box, at one precinct, could not be seen by those voters who stood near the window can not be a cause to annul the election.

The law does not authorize an election to be set aside, except for fraud, intimidation, violence or corruption, at or before the election, and then only when such fraud, violence, intimidation, etc., had the effect to change the result of the election.

It is not shown that the defendants had any connection with the irregularities committed, or with any acts of fraud, or violence, if any were perpetrated.

Nicholas Burton et als. v. Charles Hicks et als., 507.

ESTOPPEL.

1. The plea that the plaintiff is estopped from contesting the validity of the sale because he appointed an appraiser of the property sold is valid. He can not be permitted to avoid the responsibility of that act by stating that he did it under protest.

Walker v. Sawinnet, Sheriff, et als., 314.

2. Plaintiff can not now be heard to contradict the allegations of his petition in regard to the ownership of the property in litigation, which he made in another controversy, nor can a witness be heard now to contradict the testimony which he then gave.

J. O. Howell v. Sheriff of East Feliciana et als., 701.

EVIDENCE.

1. The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. Robert K. Anderson, 18.

2. The rules and regulations of the United States Board of Supervisors do not specify and particularize the short bends and points

EVIDENCE—Continued.

at which certain precautionary signals are to be made by steamers. In the absence of such specification by the board, it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places where, by the rules and regulations governing pilots, signals are to be given.

A transcript of the proceedings before the United States inspectors, in relation to the sinking of the steamboat *Texarkana*, which gave rise to this suit, embracing the evidence taken on that occasion, was offered on the part of defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios* and irrelevant. The court *a qua* sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. The court did not err. The action taken by the board of inspectors could not bind the plaintiff who was not a party to it.

Kennett & Bell v. Union Insurance Company of New Orleans, 26.

3. Parol evidence was clearly inadmissible to prove that the wife of the defendant was the debtor in a contract executed by him, and that he signed it as her agent, and not in his individual capacity as it appears in the contract itself, no error or mistake in executing the instrument being alleged in the answer.

This testimony being excluded, there is no reason why the defendant, who was not one of the heirs of his wife's father, should not pay the debt he contracted with the administrator of the succession, whether there are, or not, sufficient funds in his hands to pay the debts of the deceased.

If the plaintiff had consented, when the instrument was given, in consideration of the purchase by the defendant of succession property, that said defendant should not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

O. W. Fluker, Administrator, v. Amos Kent, 37.

4. It is true that the *allegata* and the *probata* must agree, but it is sufficient if the substance of the issue be proved. The real substance in this case is not where the plaintiff was, to a mathematical precision, when he was injured; but first, whether he did suffer, and secondly, whether, if he suffered, it was from the fault of the defendant.
4. But where the conduct of the plaintiff has been negligent and has contributed to the injury received, he can not recover, even though the defendant be in fault, and such is the fact in this instance. The damage done to plaintiff was in part the result of his own

EVIDENCE—Continued.

carelessness. He can not, therefore, make the railroad company responsible for a disaster which he brought to some extent upon himself.

Wm. H. Johnson v. Canal and Claiborne Railroad Company, 53.

5. Where the defendant, being sued for the payment of a certain sum in consequence of the construction of banquettes in front of his property in Locust street, averred that the city of New Orleans had not complied with the formalities set forth in the city charter in this—that one-fourth of the owners of real property fronting on said unbanquetted street did not petition for the banquetting alleged to have been done in that locality ;

Held—That a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed in that street, being found in the record, it must be supposed, in the absence of rebutting evidence, on the principle of *omnia presumuntur rite esse acta*, that the persons petitioning constitute one-fourth of the property owners on that street.

James J. O'Hara v. Henry Blood, 57.

6. Before the party insured can recover on his policy, the express condition to prevent the forfeiture of the policy—which is—that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing, must be shown to have been complied with.

The propriety of such a clause in a policy of insurance is particularly apparent in this case on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

Meyers and Winehill v. The Germania Insurance Company—Cochran & Co. et als., subrogated, 63.

7. Where the objection to the introduction of an original act of sale as evidence was: First—Because it was not an authentic act, having but one witness; second—because there was no proof of signatures; and third—because the plaintiff, having declared on an authentic act, a private writing is inadmissible ;

Held—That the judge *a quo* did not err in admitting the evidence; because it is sufficiently proved that the instrument was signed by the parties, and is not so inconsistent with the one declared on as to make it inadmissible. It was signed by a notary public, and failed in being authentic only for want of the signature of one of

EVIDENCE—Continued.

the two witnesses named in the act which was and has since been in the records of said notary. Besides, it is proved that the price of the sale was received and that the mortgage retained by the vendor was duly canceled. This shows that the title passed from the vendor to the vendee.

Miss Henrietta Morfit v. Joseph Fuentes—Heirs of Farish, Called in Warranty, 107.

8. Where the terms of the contract for building were, that "no extra was to be admitted or allowed for, unless executed under written authority, and all omissions, additions or alterations should be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an endorsement, or no allowance for the same shall be made by the other party;"

Held—That certain items of extra work claimed by the plaintiff, could not be proved by parol evidence under the contract, and second, because they were outside of the contract, in no manner connected with the specifications in the contract, and contrary to the allegations in the petition. *John Page v. Nicholson & Co., 116.*

9. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—That the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or that of the court if the husband refused the assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs, could set up proceedings to annul.

Dennis Cronan v. Edward Cochran et als., 120.

10. A bill of exceptions being taken to the admission in evidence of a notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumpsit of the debts of an old firm by a new one, which it was the object of the evidence to establish;

Held—That the evidence was properly admitted. The defendants, by pleading a general denial, put at issue the question of their liability to pay the note sued upon, and the plaintiff had the right, by proper evidence, to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper. If by an agreement *inter se*, a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement.

Henry T. Cottam v. George H. Smith & Co., 128.

EVIDENCE—Continued.

11. An inspection of the record in this case shows that there is no note of the evidence, and it appears that there was in fact no evidence introduced to sustain the various items in the executor's account, amounting to \$678 50, grouped in said account, as "amount of privileged claims paid." Under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. The ends of justice require that this case should be remanded.

Succession of Celestine Dorville—in the Matter of the Executor's Account, 131.

12. Where parol evidence does not establish a debt against a dead person, but simply shows under what circumstances and for what purposes payments were made, it is admissible.

John Pemberton et al., Administrators, v. Jules Maignan, 134.

13. The note sued upon having been given subsequently to the date of a written contract and identified therewith in its own terms, it was proper to permit parol evidence to show the settlement or agreement under which it was given. The plaintiffs are not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of a change in the sum first agreed on, and is binding on defendant in the absence of error or fraud.

The defendant being the agent of the intervenors and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery delivered to them, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained. The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any. The principle which sustains the pledge as collateral, which is placed in the hands of a broker to sell, must apply here.

*J. Davidson & Hill v. Thomas B. Bodley, Norwalk Iron Works, Intervenor*s, 149.

14. The difficulty in this case arises from the loss of a counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. The bills of exceptions as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

An unreasonable contract is not to be supposed probable. It is not to be presumed that plaintiffs, who were merchants and business

EVIDENCE—Continued.

men, would have consented to advance large sums of money to cultivate a plantation for defendant's benefit, and themselves incur all the risks and losses attending the enterprise if not successful.

Payne & Harrison v. Mrs. H. A. Stackhouse, 185.

15. The testimony of J. H. Halsey, a brother of the plaintiff, was offered in evidence to show that a certain piece of land belonged to her at the time of her marriage to her present husband, one of the defendants in this case, and that she acquired it at a sheriff's sale. The testimony was objected to on the part of the defense on the ground that it was an attempt to establish by parol, title to real estate, which required written evidence. The bill of exception to the admission of such proof was well taken.

Mrs. Mary E. Halsey v. P. S. Sandige and J. A. Payne, 198.

16. Defamation by libel is the offense charged. Sections 804 and 1051 R. S. take this case out of the strict rules of the common law, and the purport only of the libelous letter as given in the information is sufficient. It was not essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation. The law of evidence upon this subject is complied with, if the matter or purport of the instrument offered conform to the purport and description thereof in the information. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

State of Louisiana v. H. H. Willers, 246.

17. As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer that they know not the signature, but, on the contrary, aver that it is an act under private signature void for simulation, or null as a disguised donation for informalities, the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses, and the preliminary evidence on which the deed had been admitted to registry.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff, and parol evidence in support of said charge was properly rejected.

As the ancestor of the defendants could, however, have shown the simulation of the sale by a counter letter or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for

EVIDENCE—Continued.

confessed, and they establish the simulation of the sale beyond doubt.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 266.

18. Beals & Laine are sued as makers and Edward Beals as indorser of a promissory note. E. Beals' son, a member of the firm of Beals & Laine, wrote the name of his father, who can not write, as indorser of said note. The evidence showing that Edward Beals subsequently ratified the act or adopted the indorsement, this is sufficient to bind him as indorser.

George Lysle and Son v. Beals & Laine et al., 274.

19. What was never of record can not be supplied by parol. The ruling of a court upon the exclusion of evidence must be of record. The plea of *res judicata* does not rest on the regularity of the proceedings which can be removed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties.

Mrs. Isabella A. Fluker v. Mrs. Harriet Herbert. Mrs. Barkdull called in warranty, 284.

20. The coroner's inquest being signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner who is a sworn officer, his certificate of the signatures of the jurors is sufficient.

State of Louisiana v. William Evans, 297.

21. The ruling of the judge *a quo* permitting the husband of the defendant to testify in regard to the ownership of the property claimed by the third opponent, was correct. As between the third opponent and plaintiffs he was a competent witness, because the wife was not a contestant in that controversy.

The judge *a quo* did not err when refusing to allow a witness to state his opinions or conclusions as to the effect had in giving defendant credit by placing the mules in controversy on her plantation.

The objection by the seizing creditors that the third opposition was not made in time, as it was not served on them until after the sale, is not well founded under the circumstances of the case as exhibited by the evidence on record.

Schmidt & Zeigler v. Mrs. Louise B. Williston et al. Alexander Thompson, third opponent, 315.

22. In this instance there are two acts introduced which must be considered as parts of a whole and which were intended to be a full and final settlement of all the business relations of the parties. Plaintiff can not separate the different portions of this transaction, adhering to those parts which are favorable to her and repu-

EVIDENCE—Continued.

diate those which she considers unfavorable. She must, unless she had shown better reasons than she has, take all or leave all.

Josephine H. Ames v. James Hale, 349.

23. The parol evidence adduced by plaintiff to prove that the price paid by him was thirty-three hundred dollars instead of twenty-three hundred, as stated in the authentic act of sale, was properly excepted to by defendant. *Felix Formento v. F. J. Robert*, 489.
24. When defendant admitted the validity of the note sued upon and pleaded against it the extinguishment, novation and settlement stated in the answer, no proof was required of plaintiff to establish an indebtedness on the note, the law requiring no one to prove what is admitted in the answer.

The objection that the answer was not offered in evidence is frivolous. Pleadings make up the case, and are never offered in evidence on the trial thereof.

The judge *a quo* did not err in refusing to permit defendant to set up and prove an individual account against plaintiff in compensation or discharge of a debt due to him as tutor. The rights of the minors whom plaintiff represents in this action are in no manner affected by his individual indebtedness to defendant.

The entries made in plaintiff's books in the handwriting of J. P. Spears, the bookkeeper, against himself, or debiting himself, were admissible against the succession of the latter.

The declarations or statements of the witness Post to plaintiff, previous to the trial, were not admissible against plaintiff, because they were the declarations or statements of a third person, not a party in interest.

The claim of reversal of judgment because, as written, it is absolute, and not a judgment to be paid in due course of administration, is not well founded. This was evidently a clerical error in drawing the judgment, and is of no consequence, because the judgment must be construed in reference to the petition, wherein it is prayed that plaintiff's demand be paid in due course of administration.

J. B. Spears, Tutor, v. Mrs. M. J. Spears, Administratrix, 537.

25. This is an action of boundary. The judge *a quo* erred in receiving the report of the surveyors, which was not made in conformity to law. Revised Code, 834. *R. H. Lindsay v. W. A. Wright*, 565.
26. The parol testimony objected to was not inadmissible. The purpose of its introduction was not to contradict or vary the purport of a written instrument, but to establish an important allegation in the plaintiff's petition that, subsequent to entering into the written agreement, he had, at the special instance and request of defendants, supplied a considerable amount of labor and material

EVIDENCE—Continued.

appropriated to the erection of certain buildings in addition to that specified in the written act.

Daniel Buckmaster v. E. & B. Jacobs, 626.

27. The objection that the special commissioner named in the commission did not execute it, because he annexed to his signature "commissioner for the State of Louisiana," and did not affix the seal of his office, is frivolous. The person named as special commissioner executed the commission, and the addition of his title, if he be a commissioner for the State, did not vitiate his acts.

The judge *a quo* erred in refusing to receive evidence on the reconventional demand set up in the amended answer of defendant. That demand was sufficiently set forth. If the plaintiff had needed the particulars he mentions to enable him to make his defense against defendant's demand in reconvention, he should have required defendant to state with more accuracy his demand. As it is, the plaintiff appears to have been sufficiently notified of the demand against him for all practical purposes.

John Davis v. William C. Madden, 632.

28. This is a suit against an estate on an account made out against Joseph Howell, a deceased person. The plaintiff, by his own testimony and by that of another, offered to prove Howell's acknowledgment that he owed the debt and that he promised to pay it. This testimony was objected to by defendant, on the ground that such acknowledgment could only be established by written evidence. The judge *a quo* erred in receiving such testimony; neither was it competent for plaintiff to prove by parol the credits or payments alleged to have been made on the indebtedness.

The allegations that certain items of the account sued on were property belonging to plaintiff and sold by Howell, who retained the proceeds without accounting for them, were attempted to be sustained not by any written evidence, but by the parol evidence of the plaintiff and of an absent party who, by the admission of defendant's counsel, would swear, if present, that Howell acknowledged the correctness of the account. This testimony should have been excluded.

Where an account is not shown to be a stated account, and is to be regarded as an open one, it is prescribed by three years.

J. J. L. Goodman v. J. J. Bayburn, Executor, 639.

SEE SALES, No. 8—*Theriot v. Lyons, Sheriff, et al.*, 253.

SEE PARTNERSHIP, No. 8—*Carrie A. Drake and Husband v. Hays et als.*, 256.

SEE INSURANCE, No. 3—*T. G. Egan v. The Firemen's Insurance Company and Pelican Insurance Company*, 368; and

EVIDENCE—Continued.

No. 4—*A. Boos & Co. v. Merchants' Mutual Insurance Company of New Orleans*, 409.

SEE CARRIERS, No. 3—*Laurent Julien v. Captain and Owners of Steamer Wade Hampton*, 377.

SEE CHARTER PARTY, No. 2—*Wilkinson and Frank Behan v. Joseph Dalferes et als.*, 379.

SEE ATTORNEY AT LAW, No. 5—*Randolph, Singleton & Browne v. Carroll*, 467.

SEE ELECTIONS, No. 1—*Nicolas Burton et als. v. Charles Hicks et als.*, 507.

SEE MORTGAGE, No. 12—*Heard v. Patton*, 542.

SEE SUCCESSION, No. 8—*Succession of Haggerty*, 667.

EXECUTOR AND EXECUTRIX.

1. On the tenth of July, after a protracted contest, an order was rendered by the court, homologating the accounts of the executor so far as not opposed. On the fifteenth of September of the same year, Isaac D. Brown, another of the heirs of the deceased, presented an opposition to the accounts. The executor properly objected to it on the ground that the judgment homologating the accounts formed *res judicata* as to his opponents.

Credits claimed by the executor for payment of sums of money to certain heirs, except one not opposed, were correctly rejected by the judge *a quo*. These sums received by the heirs will more properly be adjusted by collation in a final partition among them of the succession.

The court reserves to the executor the right to claim, in a final settlement and partition of the estate, all amounts he alleges to have paid to the heirs.

The judge *a quo* properly struck from the executor's accounts such items as do not come within that class of necessary articles indispensable in the cultivation of a plantation.

Succession of James N. Brown.—Homologation of accounts and opposition thereto, 328.

2. The sale from some of the heirs to a co-heir could not deprive the executor of his commissions. It was a charge due by the whole estate, and where the whole of the estate passed by contract to one of the co-heirs, the whole of the charges were due to the extent of the estate by the co-heirs who purchased. There was no want of consideration for the note given by the defendant for the amount of commissions. The succession having merged in her she owed the debt.

The plea of *res judicata* is not well taken. It seems to rest upon the judgment homologating the executor's account. It is con-

EXECUTOR AND EXECUTRIX—Continued.

clusive, it is true, as to the amount due, but it is no reason why the plaintiff should lose his judgment for said amount.

Thomas S. Wells v. Annie Alexander and Husband, 624.

3. John S. Mayfield, alleging that he is a creditor of the succession of Walter O. Winn, for reasons stated, prayed for the removal of the executrix from her trust. It appears from the testimony that in 1862 the executrix sold a portion of a certain plantation belonging to the succession by private sale. It also appears that she is not now a resident of the State, and that she has not given a power of attorney, duly recorded as required by law, to any one to represent her. These are sufficient grounds for destituting her of her trust.

Succession of Walter O. Winn. On petition of John S. Mayfield to destitute Mary E. Richards, executrix, 687.

SEE JURISDICTION, No. 12—*Succession of William Bobb*, 344.

FACTORS.

1. Factors and commission merchants, when exercising their functions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intendment of the thirty-third section of the bankrupt law of 1867, and are not released from obligations contracted in that capacity by a discharge in bankruptcy.

To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established that it must be shown that the owner or consignor knew of such custom and usage and assented to it.

J. W. Banning v. R. Bleakley & Co., 257.

SEE PRIVILEGE, No. 5—*Gay & Co. v. Eaton & Barstow*, 166.

FALSE IMPRISONMENT.

1. There can be no damages awarded for an illegal arrest, unless the same was maliciously procured.

Charles Joseph Gourgues v. Charles T. Howard et al., 339.

FIREMEN'S CHARITABLE ASSOCIATION.

1. While the Babcock extinguishers are used, without by such use interfering with or being in the way of the operations of the fire department, the plaintiffs or others may lawfully use them without incurring responsibility.

The resolution of the board of directors of the Firemen's Charitable Association, passed on the twenty-sixth of January, 1875, is more stringent and sweeping than it has the right to pass. Its purport is to abolish the use of the Babcock extinguisher within the limits

FIREMEN'S CHARITABLE ASSOCIATION—Continued.

of the city of New Orleans, under any and all circumstances whatever. The chief engineer is clothed with power and instructed to prevent the Babcock engines from running to fires, and the resolution provides, that the engineer shall "send them and the men working them to prison." This is an unwarrantable stretch of power.

Teutonia Insurance Company v. Thomas O'Connor et als., 371.

FORFEITURE AND CONFISCATION.

1. Plaintiff was the owner of the property on which he made certain improvements, repairs, etc., for the reimbursement of the value of which he now sues. It is true that this ownership existed only during the lifetime of John Slidell, from whom it had been taken by forfeiture and confiscation. Still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted, he could no longer set up possession in good faith.

Joseph Brugere v. The Heirs of John Slidell, 70.

2. As Charles M. Conrad was an offender of a class mentioned in the act of Congress of the seventeenth of July, 1862, entitled an act to suppress insurrection, etc., this statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. By the decree of condemnation of the third of February, 1865, only such right or title as the said offender had, passed to and vested in the United States, and this was the title conveyed to plaintiff by the Marshal's sale on the twenty-ninth of March, 1865.

But Conrad, at that time, had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself, although the act was registered only in 1870 in the parish of Orleans, where the property is situated. Hence the United States acquired no title and could not convey any to plaintiff.

In regard to the property confiscated, the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale, who is induced to buy the property standing on the public records in the name of the defendant in execution. *E. W. Burbank v. C. A. and L. L. Conrad*, 152.

The failure of defendants to record their title in the parish of Orleans,

FORFEITURE AND CONFISCATION—Continued.

as required by the registry laws of the State, subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was nevertheless in them from the time of the sale, and neither their vendor nor his heirs could recover it from them.

As to the United States, it was immaterial whether defendants had recorded their title or not; the property in question belonged to them, and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Charles M. Conrad for offenses committed by him. The defendants were not parties to these proceedings and their title to the property could not be divested by the decree of condemnation.

Ibid, 152.

3. The plaintiffs in this suit are not attacking the proceedings and judgment in confiscation pronounced by the United States Court. They recognize the validity thereof, but say that the effect of that judgment and the sale thereunder ceased at the death of their ancestor John Slidell, and that it was only his life estate that was disposed of. This is correct, and has been frequently reaffirmed by the Supreme Court of the United States.

Heirs of John Slidell v. Germania National Bank, 354.

4. The act of Congress, July 17, 1862, to suppress insurrection, etc., and the joint resolution of the same date explanatory of it, are to be construed together. Under the two, thus construed, all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

The fact that such person owned the estate in fee simple, and that the libel was against all the right, title, interest and estate of such person, and that the sale and Marshal's deed professed to convey as much, does not change the result.

On revising the decree of confiscation by the tribunal of last resort, the rights of the parties and the questions at issue at the time of the libel and decree were the subjects of inquiry. The rights which the plaintiffs now assert were not those at issue. They could not have intervened in the confiscation proceedings against John Slidell, to assert rights which only accrued to them long afterward, namely, on the death of their father, John Slidell.

The litigation on the writ of error and the revision by the Supreme Court of the United States only involved the validity of the confiscation. In this instance, the question is, are the plaintiffs entitled, under act of July 17, 1862, to the property in controversy.

FORFEITURE AND CONFISCATION—Continued.

since the death of their father, notwithstanding there was a valid confiscation of it under said statute? The question must be decided in the affirmative.

Heirs of John Slidell v. J. Huppenbauer, 383.

GARNISHMENT AND GARNISHEES.

1. The plaintiffs having judgment against the defendants *in solido*, issued execution thereon and made Terry, one of the defendants, a party garnishee, propounding to him certain interrogatories. This proceeding was excepted to; the judge *a quo* erred in overruling the exception. Terry, being one of the defendants in execution liable *in solido* with the others, was not a third person, and could not be proceeded against by garnishment process.

John T. Bailey & Co. v. Lacey, Terry & Co., 39.

2. Judgment having been rendered against the defendants, as a firm, and the individual members thereof *in solido* for the amount of a note of the firm, there was another judgment in the same instance against Terry, one of the firm, for the same debt, on a rule against him as garnishee; this was an error; and an order making a rule upon him absolute to forthwith deposit in court sufficient cash or assets to satisfy the judgment against him as garnishee, was another error. Terry was not a third person in contemplation of the law applicable to garnishees; he was one of the defendants; judgment had been rendered against him individually and as a member of the firm. The second judgment, under a *feri facias* against the "defendants," added nothing to his liability.

Charles L. Richardson v. Lacey, Terry & Co., 62.

3. The plaintiffs contend that the garnishees having admitted that they owed Norris, the defendant, the sum of \$2933, it is incumbent upon them to prove the correctness of every item of the sum they claim the right to retain, which plaintiffs aver the garnishees have failed to do. There is no evidence introduced by the plaintiffs to disprove the truth of the answers of the garnishees. The extent of the liability of garnishees is to be tested by their answers to interrogatories, when the truth of those interrogatories has not been disproved.

Flash & Co. v. A. W. Norris—Reynolds, Dowling & Co. Garnishees, 93.

4. When a firm is cited as garnishees, the answer to the interrogatories made in behalf of the firm needs not to be sworn to and signed by each member thereof. If the firm only is cited, the firm only is bound to answer, and any member thereof may make oath and sign the firm name. If the separate answer of each member be desired, citation must be addressed to and served on each member.

F. Dupieris v. J. W. Hallisay—E. Benjamin & Co. Garnishees, 132.

GARNISHMENT AND GARNISHEES—Continued.

5. On the day fixed for hearing on the rule taken by plaintiffs on the garnishees in this suit to show cause why their answers should not be taken for confessed, an exception to the motion made by the garnishees for leave to amend and explain said answers was objected to by plaintiffs on the ground that it was too late, and overruled by the judge *a quo*.

There was no error in this ruling.

The garnishees evinced no disposition to refuse or neglect to answer, or prevaricate. Their original answers were not drawn as definitely as they might have been, but when read in reference to the manifest intent of the interrogatories which were addressed to them as bankers, gave a negative response to all the questions.

When a depositor's account with his banker is closed, the inference is clear and manifest that he has no fund in the hands of said banker.

Alfred Hennen, Mrs. A. M. Hennen, Executrix and Universal Legatee, subrogated, v. Forget, Guillotet et al. Pike, Brothers & Co., Garnishees, 381.

6. The garnishment process was not intended and can not be used to litigate and settle side issues. In this case were the attachment sustained, it would be the engrafting of the suit of J. J. McDaniel v. L. H. Gardner & Co. and A. Baldwin for damages, upon the suit of Peet, Yale & Bowling v. J. J. McDaniel & Co., and making Peet, Yale & Bowling the plaintiffs in the said suit for damages.

Peet, Yale & Bowling v. J. J. McDaniel & Co., L. H. Gardner & Co. and A. Baldwin, Garnishees, 455.

7. A garnishee can not waive service of the proceedings required by law to make a seizure of effects or property in his hands. In this case, as the garnishee was not legally served, nothing was attached in his hands.

The judge *a quo* erred in allowing damages on the dissolution of the attachment in this instance. It is not pretended that the plaintiffs were not entitled to sue out the attachment against their debtor, a non-resident. There has been no abuse of that harsh remedy here, but merely a failure to get the benefit of the writ, because of the error committed in executing the process.

John Phelps & Co. v. Horace Boughton, 592.

GASLIGHT COMPANIES.

SEE PRIVILEGE, No. 4—*Crescent City Gaslight Company v. New Orleans Gaslight Company, 138.*

GOVERNOR.

1. This appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, on the twentieth of July, 1874, the relator procured the consent of the Governor for the transfer of the case to Monroe, and for its trial at the term held at that town. The Governor also employed an attorney for the defense, notwithstanding the opposition of the Attorney General and of Dubuclet, the defendant.

The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and the act 21 of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

State ex rel. Albert Baldwin v. Dubuclet, State Treasurer—State of Louisiana, Intervenor, 29.

SEE OFFICES AND OFFICERS, No. 9—*State ex rel. Leonard v. Jackson, 541*; and

No. 10—*State ex rel. Jacob A. Meyer v. Joshua Van Tromp, 569.*

HOMESTEAD.

1. The right granted to the widow or minor children of a deceased person by the homestead act, vests in them at the time of the death of the deceased, provided their condition of life at that moment entitles them to the benefit of the provisions of the act; their pecuniary circumstances at the time of the death of the insolvent, and not at any subsequent time, settles their right to any claim under the act. *Succession of S. Marx, 99.*
2. The property for which exemption from seizure is claimed by plaintiff, under the homestead law, seems under the circumstances of the case to partake more of the character of rural than urban property. The humane provisions of the homestead law reserving to the unfortunate debtor a home, and soil to cultivate, must be interpreted in the same spirit in which they were framed. *Christian Baden v. J. B. Reeves, Executor, and Sheriff, 226.*
3. The obligations sued upon were entered into subsequent to the homestead law, and are therefore subject to it. These obligations novated a debt previously existing and secured by mortgage. Whether this original mortgage was valid or not for want of re-inscription is immaterial. It was abandoned and became inoperative

HOMESTEAD—Continued.

by the consent of the original mortgagee, who received in lieu thereof the new obligations, which are now sought to be enforced.

Robert J. Moore v. A. J. Beelman.—Same v. Mrs. Laura J. Beelman. (Consolidated) 276.

4. It is contended in this case that the law only authorizes a homestead against the estate of the deceased husband or father, and not against the succession of the deceased mother. This construction of the homestead law is untenable. Such a construction would be at war with the plain meaning of the law, as well as with the obvious purposes for which it was enacted.

Succession of Mrs. Mary Coleman—Opposition of I. W. Arthur & Co. et als. to final account, 289.

5. It is manifest that the act 33 of the acts of 1865, entitled "An Act to exempt from seizure and sale a homestead and other property," was intended to apply to seizures under execution after the passage of the law, regardless of the period when the debts were contracted, upon which the judgments were rendered. When the authors of the statute undertook to enumerate the claims which they desired exempt from the operation of this law, the presumption is they mentioned all that they intended.

The law is unambiguous, and, under pretext of a construction, this court can not rightfully apply a limitation upon its operation, for this would be virtually enacting an amendment to the law, or exercising legislative powers.

If the defendants, prior to the enactment of the homestead act of 1865, had acquired a privilege or mortgage on the property in question, that right would not be impaired by the law. But this court has never decided that a judgment rendered after the passage of the homestead law, on an ordinary debt existing previously, is exempt from the operation of said homestead law.

A State has a right to pass a homestead law of the kind mentioned in this suit, and its operation against an ordinary creditor whose claim existed before its passage, in no manner contravenes the provision of the constitution of the United States prohibiting a State from enacting a law impairing the obligations of contracts.

William Doughty v. The Sheriff et als., 355.

HOSPITAL.

1. The State had the right to pass act No. 60 of the acts of 1872, styled "An Act to establish a hospital for small pox, and other contagious diseases," and in the exercise of its police power to require all indigent cases of small pox or other contagious diseases to be sent by the city of New Orleans to the Luzenberg Hospital, at the expense of said city, and the defendant can be enjoined from contravening this law.

State of Louisiana ex rel. A. P. Field, Attorney General and J. J. Hayes v. City of New Orleans et als., 521.

HUSBAND AND WIFE.

1. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—that the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or of that of the court if the husband refused his assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs, could set up proceedings to annul.

Dennis Cronan v. Edward Cochran et als., 120.

2. In this case it can not be doubted that the plaintiff had the right to manage her plantation, which was paraphernal property, and that a mandate having for its object the management thereof has a lawful object. Therefore, as there is no law forbidding the plaintiff from appointing her husband an agent to aid her in the administration of her plantation, it must be concluded that she had the right to do so.

The thing seized being raised on the plantation of plaintiff, which she administered, aided by her husband as agent, it follows that it was her separate property, and not liable to seizure by her husband's judgment creditors.

• *Amelia Simoneaux, Wife of Emile E. Lauve, v. Edgar P. Heluin, Sheriff, et al.* 183.

3. The judgment of separation between plaintiff and her husband was a nullity because it was not executed by a giving in payment or by a *bona fide* non-interrupted suit to obtain payment as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

The conveyance under which plaintiff claims the property seized is covered by neither of the three cases mentioned in article 2446, and in the language of article 1790, such contract between husband and wife is forbidden.

Mrs. Emily Heyman v. The Sheriff of East Feliciana et al., 193.

4. There is no force in the objection that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and that the judgment against them is null, inasmuch as they were not in legal contemplation in court, and could not stand in judgment. The petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This is sufficient, and fulfills the requirements of the law.

Riley v. Heirs of Riley, 248.

5. No grave and insuperable cause exists justifying a decree of divorce

HUSBAND AND WIFE—Continued.

in this case. It was not the intention of the lawmaker that courts should be governed in their decisions of cases of this sort by the declarations and wishes of the parties themselves, acting under excitement and dissatisfaction. Their allegations of grievances insupportable, must be made good by proof, to authorize the action of the judge. It is not every family feud declared by husband or wife to be insupportable that will authorize a decree. It is in the great interests of society that the conjugal relation should not be dissolved except upon weighty and well-established reasons.

Nelson J. Scott, Husband, v. Georgia Scott, Wife, 594.

SEE DATION EN PAIEMENT, No. 1—*E. Newman & Co. v. Eaton and Wife*, 241.

SEE COMMUNITY, No. 3—*Mrs. A. B. Barrow et al. v. J. H. Stevens, Sheriff, et als.*, 343.

INJUNCTION.

1. In this instance, where the plaintiff enjoined an order of seizure and sale issued on behalf of defendants, the judge *a quo* did not err in dissolving the injunction for the sum really due by plaintiff, and perpetuating it as to the small sum received by defendant and to be credited to plaintiff, but he should have allowed damages on the amount that was due. The remittitur by defendants is an admission that the writ issued for more than was due. The making of a remittitur does not remove the existence of the cause for the injunction, to that extent, at the date of its issuance.
John T. Michel v. Zerilla Meyer et al., 173.
2. The privy, in this instance, being built upon the yard or space of ground belonging in common between the parties, the defendant had no right to place or keep said privy on it without the consent of his co-owner.
Martin Kenopsky v. Mark Davis et al., 174.
3. In this instance, the property was in the hands of the sheriff under a writ of seizure and sale, and as this court does not find that said writ was set aside, it certainly was and is the duty of the sheriff to hold the property under the writ until the injunction arresting its further execution is disposed of, notwithstanding the irregularities that have occurred. The writ of provisional seizure was expressly set aside and the injunction reversed, or resuscitated, but the executory process was not annulled, nor ordered to be vacated. If the injunction has any force, it is in arresting the sale under said process. As the sheriff, however, has done what the relator seeks in this proceeding, and has possession of the property under the writ of seizure and sale, it is unnecessary to render the decree prayed for by said relator. The rule therefore

INJUNCTION—Continued.

must be dismissed, but the sheriff is ordered to hold possession of the property.

State ex rel. E. J. Gay v. Judge of the Fifth Judicial District Court and Sheriff of the Parish of Iberville, 212.

SEE MORTGAGE, No. 2—*Lehman, Newgass & Co. v. Ranson*, 279.

SEE METROPOLITAN POLICE WARRANTS, No. 1—*Louisiana National Bank v. City of New Orleans*, 446.

SEE SALES, No. 17—*Lynch v. Mrs Kennedy and Husband*, 464.

INSURANCE.

1. Before the party insured can recover on his policy, the express condition to prevent the forfeiture of the policy—which is, that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing, must be shown to have been complied with.

The propriety of such a clause in a policy of insurance is particularly apparent in this case on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

Meyers and Winehill v. The Germania Insurance Company—Cochran & Co. et als., Subrogated, 63.

2. Where the defendants answered that they had issued the policy of insurance sued upon at the instance of Bader, agent of the plaintiff; that, when called upon to pay the premium, he referred them to plaintiff who declined paying, on the ground that her agent must have paid it; that, afterward calling on Bader and informing him of the failure of plaintiff to make payment, he advised them to cancel the policy, which they accordingly did, wherefore they were no longer bound;

Held—That where a policy of insurance is issued without prepayment of the premium, the inference is that the insurers intended to extend a credit for its payment; that it was not at the option of the company to cancel the policy; that they only had the right to claim a dissolution of the contract for nonpayment of the premium upon putting the other party *in mora*; that Bader was only empowered to apply for the renewal of the policy, and was without instructions or authority to consent to its annulment.

Marceline Latokz v. Germania Insurance Company of New Orleans, 113.

3. This was merely a case of ordinary reinsurance, no policy being

INSURANCE—Continued.

issued, no written agreement being entered into, but the application for reinsurance by the Fireman's Insurance Company being entered in the books of the Pelican Insurance Company, as it is inferred to be the custom among insurance companies in cases of this kind.

If there was a stipulation *pour autrui*, or a contract whereby the Pelican Insurance Company assumed the obligation of the Fireman's Insurance Company, the plaintiff can not enforce it, because said agreement was not in writing, and the law is that the promise to pay the debt of another can not be proved by parol evidence.

Thomas G. Egan v. The Fireman's Insurance Company and The Pelican Insurance Company, 368.

4. It is a settled question that in an action on a valued policy of insurance the plaintiff is not put on proof of his interest in the object insured by a plea of the general issue.

In this case, however, the evidence shows that the plaintiffs had an insurable interest in the stock of goods belonging to Marks, on which they took a fire policy. They furnished Marks with goods, and upon their credit and responsibility enabled him to obtain goods from others, and subsequently paid for them. The plaintiffs' sole reliance, it seems, for payment, rested upon the fidelity and success of Marks' business. The danger of loss by the destruction of the store and Marks' stock of goods on hand constitutes a sufficient interest in the plaintiffs to sustain the policy.

The plea that the policy became void by the plaintiffs taking insurance on the same property in the New Orleans Mutual Insurance Association without notice to defendants is not tenable. The other insurance taken on the property was in the interest of a different party.

A. Roos & Co. v. Merchants' Mutual Insurance Company of New Orleans, 409.

5. Clark, as the agent of Mrs. Lane, having entered into a contract of assurance with defendant and paid the premium with her means, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

George D. Pritchett v. Mechanics' and Traders' Insurance Company. Mrs. Sarah O. Lane, Intervenor, 525.

6. When there is in the description or designation of the buildings in which the goods insured are located such misrepresentation of a material fact as to avoid the policy, the insurers are released from responsibility.

O. N. Prudhomme v. Salamander Fire Insurance Company of New Orleans, 695.

INTERVENTION.

1. The intervention is dismissed. The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

If the intervenor had a lessor's privilege, it should have been asserted before the sequestered property was released on bond. No fraud and collusion are shown between the plaintiffs and the defendant. The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued.

D. R. Carroll & Co. v. H. T. Bridewell. Mrs. Lizzie Hamilton, Intervenor, 239.

SEE APPEAL, NO. 3—*State ex rel. Mississippi and Mexican Gulf Ship Canal Company v. Administrators of the City of New Orleans, 469.*

SEE PRACTICE, NO. 7—*State ex rel. Mrs. Pecot v. Parish Judge of the Parish of St. Mary, 184.*

JUDGMENT.

1. According to plaintiff's own statement, his claim is based on the balance due him on a judgment in his favor of the Third District Court, parish of Orleans, against S. M. Montgomery, which judgment, by execution issued thereon, was not satisfied in full. The judgment of the Third District Court was rendered on the twelfth of December, 1863; it was affirmed on the tenth of June, 1867. Meanwhile the property was seized, and, on the fifth February, 1864, was sold to plaintiff, who claims that there is a balance of \$7002 due him on the judgment.

This present suit was instituted in the Second District Court, parish of Orleans, against the representatives of the said S. M. Montgomery, deceased, to cause the plaintiff to be recognized as a creditor of the estate in the above amount to be paid in due course of administration.

It has been decided that a devolutive or suspensive appeal from a final judgment of a district court does not suspend prescription pending the appeal. Therefore prescription, running in this instance from the twelfth December, 1863, the day on which the judgment relied on by plaintiff was rendered, which judgment was affirmed on the tenth January, 1867, was not interrupted by this suit, instituted on the fifth of December, 1871, and fixed for trial on the eleventh September, 1874, on motion of plaintiff's counsel, when, on that day, the defendant filed the plea of prescription.

To revive a judgment, citation must issue from the court which rendered it. To revive the judgment sought to be enforced in this case, citation should have issued from the Third District Court.

JUDGMENT—Continued.

The suit in the Second District Court can in no sense be considered as a suit to revive the judgment of the Third District Court, and if it were, the second court, under the statute of 1853, had no power to revive it. Hence the foundation on which the plaintiff's claim rests, to wit: the judgment of the Third District Court, has been destroyed by time.

Henry Samory v. Widow Samuel M. Montgomery, 50.

2. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

But the judgment complained of was rendered also on the written consent of Frank Haynes, her attorney. His authority to consent to the judgment with a stay of execution until a certain specified time has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it.

The attorney was a sworn officer, bound by his oath to act correctly in the pursuits of his profession. Thus situated, it is not to be presumed that he acted without proper authority. On the contrary, every presumption is in favor of his having pursued the proper course of conduct, unless the contrary should be suggested on affidavit.

In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular.

M. A. Dockham and Husband v. Jonathan Potter, 73.

3. The judgment of separation between plaintiff and her husband was a nullity because it was not executed by a giving in payment or by a *bona fide* non-interrupted suit to obtain payment as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

The conveyance under which plaintiff claims the property seized is covered by neither of the three cases mentioned in article 2446; and in the language of article 1790, such contract between husband and wife is forbidden.

Mrs. Emily Heyman v. The Sheriff of East Feliciana, et al., 193.

4. A judgment acquiesced in and partially executed can not be appealed from.

The plea that acquiescence in a judgment can not be given by a

JUDGMENT—Continued.

police jury so as to prohibit a parish from appealing from a judgment rendered against it, is not tenable. There is no reason why a parish should not be bound by the acts of its agent as an individual would be.

O. K. David v. The Parish of East Baton Rouge, 230.

5. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

There is no force in the objection that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and that the judgment against them is null, inasmuch as they were not in legal contemplation in court, and could not stand in judgment. The petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This is sufficient, and fulfills the requirements of the law.

Isaac F. Riley v. Heirs of E. M. Riley, 248.

6. Proceedings were taken in the Sixth District Court of New Orleans to revive the judgment obtained by the plaintiff against one Richard Nugent, and on which he rests his claim in this suit. Citation was made on Nugent, then an adjudged bankrupt, discharged from all liability on the judgment, and having no interest whatever in the matter. The citation was, therefore, null and void, and the judgment which followed void also. The plea of prescription against plaintiff must prevail.

Charles E. Alter v. James McCullen, 251.

7. On the fourth of March, 1865, defendant bought from Peter Mackley the property in dispute, and was put in possession of the same. On the thirteenth day of September of the same year, Ashworth obtained a judgment against Mackley in the following words: "By reason of the law and evidence being in favor of plaintiff in the within suit, it is hereby ordered, adjudged and decreed, that plaintiff do recover judgment as prayed for."

The certificate of the recorder of mortgages shows that this judgment was recorded thus on the twenty-sixth of September, 1865: "A judicial mortgage in favor of James Ashworth v. Peter Mackley as prayed for."

JUDGMENT—Continued.

On the thirteenth of October, 1865, a *fiery facias* issued in the case of *Ashworth v. Mackley*, and the sheriff in his return states he seized the property in controversy, as the property of Mackley, and advertised and sold the same.

There is nothing in the above mentioned return, or in this record, to show that the property was ever in the possession of the sheriff. The opinion of the deputy sheriff that he seized the property is not sufficient. He should have stated facts showing how he effected the seizure. So far as the record shows, the defendant was not disturbed in his possession until after the sheriff's sale.

In the mean time, Mackley, the vendor, and Carrane, the vendee, having learned that the recorder had made an error of description in the deed of sale from the one to the other, went together before the recorder, and by a public act, which was duly recorded, corrected the mistake.

There is no force in the assertion that, inasmuch as the judgment of *Ashworth* against *Mackley* was recorded before the correction of the misdescription of the property sold to *Carrane*, the judicial mortgage in favor of *Ashworth* attached, and the correction was made too late. There was not a registry of such a judgment as could create a mortgage against the property. The judgment specified no amount, and the registry thereof gave no notice to third parties. There was no seizure, and there could be no legal sale of the property, because the sheriff did not take possession.

Alexander Lirette v. John Carrane, 298.

8. A judgment is not completed and can not operate as a judicial mortgage or have any effect until it is signed. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment.

Widow Elizabeth Marchal v. Harriet Hooker et als, 454.

9. Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void. *Succession of Ernest Poree*, 463.
10. Under the circumstances of the case, a mere clerical error, such as *Joseph N. Robert* for *F. J. Robert*, in the decree of the court from which an appeal is taken, can be corrected by this court in revising the judgment. The defendant, who raises the objection, is estopped by his judicial admissions from denying that he is the party condemned at the trial below. *Felix Formento v. F. J. Robert*, 489.
11. There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses, because that was virtually a

JUDGMENT—Continued.

consent judgment, and the rule is, such judgments are binding only on the parties.

State ex rel. Lubie v. Administrator of Finance, City of New Orleans, 493.

12. Notice of subrogation to a judgment, served after the seizure thereof, has no effect to disturb rights acquired previously.

It was absurd for the succession of P. C. Lemane, having judgment for \$700 against Henry Lemane, to seize thereunder the judgment of the latter against the succession of P. C. Lemane, for \$500. At the time of the seizure the respective judgments were compensated. The law tolerates no such absurdity as a judgment creditor seizing a judgment against himself.

The objection that this court is without jurisdiction because the judgment seized and which the third opponent claims as subrogee, does not exceed five hundred dollars, is unfounded. At the time of the seizure the judgment and interest exceeded that sum.

Widow P. C. Lemane, Administratrix, v. Henry Lemane. Ignace Halum, Third Opponent, 694.

SEE APPEAL, NO. 2—*B. Esterbrook and A. Gallier v. Mary B. Gauche*, 36.

SEE PRIVILEGE, NO. 12—*New Orleans Canal and Banking Company v. The Recorder of Mortgages of the Parish of Pointe Coupee*, 291; AND NO. 14—*Nicolson & Co. v. Citizens' Bank*, 369.

SEE OBLIGATIONS AND LIABILITIES, NO. 14—*Stevenson v. Lavinia Edwards et als.*, 302.

SEE MORTGAGE, NO. 8—*Mathilde Morrison v. Citizens' Bank et als.*, 401.

SEE SALES, NO. 15—*Edwards v. Fairbanks & Gilman*, 449.

SEE EVIDENCE, NO. 24—*Spears, Tutor, v. Mrs. Spears, Administratrix*, 537.

SEE BANKRUPTCY, NO. 4—*Keeting v. Arthur, Stone & Co.*, 570.

JURISDICTION.

1. This is a personal action against the owners of a steamboat, the vessel being seized to enforce a lien accorded by a State law, under the conservatory remedy of provisional seizure. It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction. The State court, having once obtained lawful jurisdiction over the parties and subject matter, could not be subsequently divested thereof by the bankrupt court.

Congress has not only not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee in bankruptcy. This principle applies

JURISDICTION—Continued.

not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains unascertained.

E. A. Switzer v. John Heinn and Mary Heinn, Owners of the Steamboat Frolic, 25.

2. A suit instituted in a court without jurisdiction interrupts prescription. *Henry J. Sorrell v. Victor Laurent*, 70.
3. Courts have no power to promulgate laws, and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and not within those of the judicial.

State of Louisiana ex rel. The Crescent City Waterworks Company v. P. G. Deslonde, Secretary of State, 71.

4. In this suit, instituted by plaintiff to recover his share in the succession of his grandfather and grandmother, the only question being whether the Second District Court, parish of Orleans, had jurisdiction to issue the order of sale to operate said partition;

Held—That the court *a qua* did not err, under the state of facts existing in the case, and by virtue of article 924 of the Code of Practice, in maintaining its jurisdiction. Having jurisdiction, it could order the sale of the property to be partitioned, and it follows that the liens and mortgages on the property sold were shifted to the proceeds. The opponent, Sickerman, retains his right to participate in said proceeds to the extent of his mortgage. The purchasers of said property could not be compelled to pay the price before they were tendered an unencumbered title, and all that they required was the erasure of the mortgages on the property sold. *Charles Diamond v. Robert E. Diamond et al.*, 125.

5. In this instance a writ of injunction was issued by the Superior District Court, at the suit of plaintiffs, restraining the city of New Orleans from enforcing any claim against them for pretended levee dues, wharfage or port charges, and prohibiting W. L. Evans, a justice of the peace, from further proceeding in certain specified cases pending before his court.

An exception was correctly taken to the jurisdiction of the Superior District Court. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them.

Wm. G. Wilmot et al. v. The City of New Orleans et al., 158.

JURISDICTION—Continued.

6. One must be sued before the judge having jurisdiction of the place of one's domicile, except in the cases provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases.

A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding the parties, and consent can not give jurisdiction.

Edward J. Gay & Co. v. Eaton & Barstow, 166.

7. The defendant objected to the jurisdiction of the court below on the ground that he was, as alleged in the petition, a citizen of the State of New York. A citizen of that State can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile, for the reason that, in so far as this State is concerned, he has no domicile.

Perkins & Billiu v. Charles Morgan, 229.

8. In this court the intervenor has filed an affidavit in which she charges that the person who represented her in the court below had no authority to do so. This is a matter which this court can not discuss originally.

Peter Borsland v. Henry Leckie. Miss M. M. A. Calhoun, Intervenor, 235.

9. In this case no sentence having been pronounced, and no fine imposed in the court *a qua*, the plea to the jurisdiction of this court, founded on article 74 of the constitution, must prevail.

The State of Louisiana v. Matilda Brown, Martha Brown and Chapman Epps, 236.

10. The peremptory exception to the jurisdiction of a special judge to issue an order granting letters of executorship *ratione materiz* was properly overruled. Under the facts of this case the parish judge proceeded lawfully in selecting a lawyer having the proper qualifications to preside over the trial in his place.

Succession of Mrs. S. B. Fuqua, 271.

11. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and

JURISDICTION—Continued.

resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferer, the payee thereof, was a citizen of this State and had no such right.

New Orleans Canal and Banking Company v. The Recorder of Mortgages of the Parish of Pointe Coupee et als., 291.

12. In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in this case, because it is a power essentially necessary in the settlement of successions, and as an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

A sale *a la folle enchere* is a lawful sale which the parish court may make in the exercise of its probate jurisdiction; and an injunction of a sale of this character is as much probate in nature as an injunction of the first sale, or the first offerings.

Service of the order to give security was made in this case upon the attorney at law of the testamentary executor, said executor being at the time absent from the State. This is sufficient.

When the testamentary executor of the deceased fails to give security, or from any other cause can not discharge the duties of his office, the judge must appoint the public administrator of the parish. The act of 1870, establishing the office of public administrator, repeals former laws on the subject.

Succession of William Bobb—Ernest Merilh v. W. L. Hodgson, on Injunction herein and on Opposition to Application for Dative Executor, 344.

13. It would be improper to attempt to decide anything in regard to the title of the property in controversy, even if the court had jurisdiction, as the vendee is not before the court, and it would be no less wrong to make an order to put the legatee in possession of property which is shown to have passed out of the succession, and the possessor is not before the court.

It is manifest that the judgment decreeing the title of the property to be still in the succession is wrong, as no such allegation or prayer is made in the petition.

It is equally clear that if it had been made, the parish court would have been *ratione materiæ* without jurisdiction to try that question, as the value of the property exceeded five hundred dollars.

Succession of Joseph Ricard, 365.

14. Until the error in the judgment condemning Joseph N. Robert instead of François J. Robert was corrected, execution could not issue against the said François J. Robert, because he was not con-

JURISDICTION—Continued.

demned in the decree, and as the case was pending for revision in this court, the judge *a quo* was without jurisdiction and could not change the decree.

Felix Formento v. Francis Joseph Robert, 445.

15. The defendants in this instance are the legal representatives of one Zeller, who went security on a release bond given in the suit of *Switzer v. steamboat Frolic*. The defense is that the assignee in bankruptcy for the owners of steamboat Frolic had no right to stand in judgment for said owners, and that the State court had no jurisdiction to render a judgment against the assignee. This defense is not well founded. The bankrupts having been discharged, no judgment against them could be obtained, and there is nothing in the bankrupt law which required the discontinuance of suits already commenced.

Edgar A. Switzer v. Mrs. M. A. Sellar et als., 468.

16. The motion to dismiss the appeal of *Glover & Odendahl*, on the ground that the court is without jurisdiction because the amount in controversy is below five hundred dollars, must be overruled, the proceedings in the case being considered in the nature of a *concurus*.

Smith & McKenna v. Edwin Charles, 503.

17. By the confirmation by Congress, on the third of March, 1857, of the selections made by the State of lands granted to her by the act of Congress, approved March 2, 1849, and the act approved September 28, 1850, and by the act of the State No. 104, of the acts of 1871, confirming all sales and locations of public lands made by the State from the first day of January, 1861, to fourteenth October, 1864, the land in controversy in this instance was severed from the public domain, and the subsequent grant thereof by the United States in no manner impaired or defeated the title previously acquired by the State and transferred to plaintiff.

The position taken by defendant that the land department decided the land to belong to him, and that their action precludes the investigation and determination of the case by this court, is unfounded.

The officers of the land department may adjudicate the title of the United States, and to that extent the adjudication is final. It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to lands. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the land department gave the defendant none, and the question whether the United States had any title at the time of the adjudication.

JURISDICTION—Continued.

cation is clearly a question for the courts of justice, and not for the officers of the land department to decide.

James Marks v. O. O. Martin, 527.

18. Appeals from the Superior District Court of New Orleans are returnable at New Orleans. That court, therefore, was without authority to make this appeal returnable at Monroe. Consent can not give jurisdiction, neither can consent change the law which designates the place where appeals shall be returnable.

The Citizens' Bank of Louisiana v. The Board of Liquidation, 543.

19. The exception to the jurisdiction of the district court was properly maintained. The execution having issued from the parish court, the parish court was the proper court to apply to for an injunction to restrain property seized under the judgment from being sold. The value of the property to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of the property not subject to seizure. *G. W. McGinty v. W. L. Richmond, Sheriff, et al.*, 606.

20. A. L. Gusman, alleging an interest in the affairs of a defunct insurance company, applied to the judge of the Superior District Court, parish of Orleans, for a mandamus to compel M. A. Pike and John A. Pike who had possession of the books of the company, to grant him access to the same for examination. On the writ being made peremptory, the relators M. A. Pike and John A. Pike moved for a suspensive appeal, which being granted was subsequently set aside and permitted to operate only as a devolutive one. Whereupon relators applied to this court for a writ of prohibition to be directed to the judge *a quo* and the civil sheriff of the parish of Orleans, restraining them from proceeding in the premises. As there is nothing in the record to show that there is an amount exceeding five hundred dollars in dispute, this court has no jurisdiction *ratione materiae*.

State ex rel. M. A. Pike and John A. Pike v. The Judge of the Superior District Court, Parish of Orleans, 676.

21. No complaint being made as to the sufficiency of the surety, the district judge dismissed the appeal mainly upon the ground that the matter in controversy does not exceed five hundred dollars. After granting the appeal, his jurisdiction over the case, except as regards the sufficiency and legality of the bond, was gone.

State ex rel. Alexis Ribet v. Judge of the Third District Court, Parish of Orleans, 684.

SEE CRIMINAL LAW, No. 5—*State v. George Frits, alias George Frey*, 360.

JURISDICTION—Continued.

SEE SURETY, No. 7—*Kimbrough, Administrator, v. Walker et als.*, 568.

SEE WIDOW, No. 3—*Succession of Callie N. Newman*, 593.

SEE SALES, No. 23—*Duckworth v. Vaughan et als.*, 599.

SEE ACTION, No. 11—*Lay et als. v. Succession of Elias O'Neal*, 643.

SEE SUCCESSION, No. 9—*De La Ferriere v. Succession of England*, 686.

SEE TAXES AND TAX COLLECTORS, No. 13—*State ex rel. Norcross v. Judge of the Fourth District Court, parish of Orleans*, 704.

JURIES AND JURORS.

1. This court is not aware of the existence of any constitutional provision making it imperative upon the Legislature to accord a trial by jury in all civil cases. It was competent for the law-making power to provide that cases like the present one should be tried without the intervention of a jury. Therefore it had the right to prescribe, as it did in this class of cases, that issues of the sort here presented should be tried by a jury, if any party to the suit pray for it; and to provide, in the event the jury do not agree, or fail to render a verdict either for the plaintiff or defendant, that the case be determined by the judge.

O. S. Sauvinet v. Joseph A. Walker, 14.

2. The two sections 2125 and 2153 of the Revised Statutes must be construed together, and the section 2153, allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section 2125. *William Golding v. John Petit*, 86.
3. Under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk, and sheriff. The drawing for the term was made by the parish judge, clerk, recorder, and the sheriff. Therefore all the officers required by law to draw the panel were present and officiated in the act. The placing in the order of the judge for the drawing at that term the additional officer, the recorder, was, doubtless, an oversight, and may be regarded as surplusage. The objection to the drawing has no weight.

Christopher Hunt v. John Mayo, 197.

4. Before the jury was impaneled, defendant objected through his counsel to the impanneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court *a qua* erred in overruling the objection and proceeding to trial.

State of Louisiana v. Joe Guidry, 206.

LACHES.

1. The plaintiff sues to recover from defendants, testamentary executors of Wilhelmus Bogart, a certain sum of money, which, while plaintiff was a minor, said Bogart, acting in the capacity of under tutor, had under his control and management. After becoming of age, plaintiff received, in settlement with Bogart, certain promissory notes and commercial papers in which Bogart had invested plaintiff's funds in 1860, and of which a considerable portion subsequently turned out to be worthless. After having kept the aforesaid obligations until 1871, a period of seven years, and after prescription has accrued, he now tenders them back on the ground of his having been induced to receive them in settlement by fraudulent misrepresentations.

If said obligations and commercial papers were worthless at the time he received them, plaintiff must have become acquainted with that fact not long after, and might have used more diligence in seeking redress, when it was in his power to put the other party in the same situation he was in when delivering the assets to plaintiff. Therefore by his own laches the plaintiff has foregone the right he originally had to exact from the manager of his affairs a rigid accountability.

Bogart Shall v. P. H. Foley and W. B. Conger, Testamentary Executors of Wilhelmus Bogart, 651.

LAWS AND STATUTES.

1. Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue.

The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873, provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the legislator for enforcing a right of the sovereign and is *due process of law*.

The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. Robert K. Anderson, 18.

2. The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and

LAWS AND STATUTES—Continued.

the act 21, of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

State ex rel. Baldwin v. Dubuclet, State Treasurer—State of Louisiana, Intervenor, 29.

3. The will relied on by Mrs. Burke, a third claimant, is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made. It is not sufficiently proved that the parties lived in open concubinage and were therefore not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

The rights of Mrs. Elliot, the surviving widow and fourth claimant, must be determined by the laws of Mississippi. According to those laws, said widow is entitled to one-half of the personal property of the deceased.

The immovable property is controlled by the laws of this State and passed under the will to Mrs. Burke.

Succession of Hampton Elliot, 42.

4. The two sections 2125 and 2153 of the Revised Statutes must be construed together, and the section 2153, allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section 2125.

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5. Under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk and sheriff. The drawing for the term was made by the parish judge, clerk, recorder and the sheriff. Therefore all the officers required by law to draw the panel were present and officiated in the act. The placing in the order of the judge for the drawing at that term the additional officer—the recorder—was, doubtless, an oversight, and may be regarded as surplusage. The objection to the drawing has no weight.

Christopher Hunt v. John Mayo, 197.

6. It is a rule of general jurisprudence, as well as a principle of public policy, to construe the redemption laws liberally. The object of the State is to collect the revenues, and not to deprive its citizens of any rights.

LAWS AND STATUTES—Continued.

It is not to be deduced from the act No. 47 of the acts of 1873 that it takes away from creditors and all other parties interested, except the owner, the right of redemption which they had formerly enjoyed. If a mortgagee is a species of owner or quasi owner, as the doctrine is, he is embraced in the exception made by the express words of the statute.

Charles E. Alter v. Henry Shepherd et als., 207.

7. Section 1067 of the Revised Statutes does not repeal article 338 of the Code of Practice in regard to the recusation of judges.

State ex rel. O. Provosty, District Attorney v. Judge of the Seventh Judicial District Court, 225.

SEE PRIVILEGE, No. 1—*Mrs. O. K. Dunning v. Coleman & Co.*, 47.

SEE PRESCRIPTION, No. 2—*Cohen & Wilson v. Golding & Lacroix*, 77.

SEE ACTION, No. 4—*Cronan v. Cochran et als.*, 120.

SEE LEVEES, No. 2—*Louque v. Louisiana Levee Company*, 134.

SEE TAXES AND TAX COLLECTORS, No. 4—*City of New Orleans v. Caselar*, 156.

SEE SHERIFF'S FEES, No. 1—*City of New Orleans v. Patton, Sheriff*, 158.

SEE OFFICES AND OFFICERS, No. 2—*State v. Jonas*, 179; and

No. 6—*State on Information of J. B. Cooper v. Schumaker et al.*, 332.

SEE MARKETS, No. 1—*City of New Orleans et als. v. James Stafford*, 417.

SEE BONDS, No. 9—*State ex rel. Forstall v. Board of Liquidators*, 577.

SEE SALES, No. 24—*Copley v. Dinkgrave*, 601.

LESSOR AND LESSEE.

1. The effects of a third person equally with those of the lessee are, by article 2707 of the Civil Code, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy it would seem that the privilege would continue to attach like those of the lessee, and on the same conditions, for fifteen days after removal. But, by the well-established rule that privileges are *stricti juris*, this court is precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons only on the conditions imposed in article 2707 of the Code, and to those conditions it is thought that the privilege must be restricted.

E. T. Merrick, Race & Foster v. Emile La Hache. St. Louis Piano Manufacturing Company, Interveners, 87.

LESSOR AND LESSEE—Continued.

2. The proprietor of a building leased to a tenant is not liable in damages to third parties resulting from the use to which the tenant may put the leased property, unless it be shown that, at the time the lease was made, he knew the uses and purposes the tenant would apply it to, and that such use, from the nature of the business, would prove a nuisance.

Michael Muller v. H. L. Stone and Willos & Rostand. Mary Catherine and William Muller, Interveners, 123.

3. There is certainly nothing immoral in renting property to be used as a club room, and if it was converted into a gambling house, this is no reason why the lessee should not be bound by his contract, when there is no evidence that the lessor knew that the object for which the rooms were to be employed was different from the one mentioned in the written lease.

Mrs. L. P. Commagere v. William Brown, 314.

4. The right of the lessor to detain the movables subject to his privilege until the rent is paid is not incompatible with the right of an ordinary creditor to enforce his rights against the same property without depriving the lessor of any portion of his debt for rent. The payment spoken of in article 3218 of the Civil Code does not necessarily mean payment of the lessor's debt by the adverse creditor before the latter is permitted to proceed against the property. The creditor seeking to enforce his claim, as in this case, might be unable to advance the amount of the lessor's debt for rent, and thus by his poverty be debarred from pursuing a legal right, which, if enforced, would realize money sufficient to pay the lessor in full and leave a surplus for himself.

The lessor can not prevent a sale of the lessor's property, on the pretense that it would not bring the amount of his debt. No right of his is violated by a sale made in the exercise of a legal right of another against the property. If the lessor's right is preserved, if his debt is paid in whole or in part only, in case the entire proceeds of the property subject to his privilege are insufficient to pay it all, he has no just ground to complain. His rights can only be exercised concurrently with the right of others on the same property.

The assumption on the part of the lessor of the right of detention of the lessee's property continuously, unless his entire privileged debt is paid, would put the rights of others in abeyance and destroy that condition of equality before the law which all are entitled to occupy in asserting their rights in the courts of the country.

Nothing is better settled in our jurisprudence than that a creditor

LESSOR AND LESSEE—Continued.

who has a mere right of preference on the proceeds of property seized under execution has not the legal right to arrest the sale of the property, but is given the right to interpose his opposition and claim the proceeds under a distribution to be made according to law.

The injunction prayed for in this case was illegally issued. The remedy of the lessor was by third opposition, claiming her priority of privilege on the proceeds of the property seized and subject to her privilege.

Frank F. Case, Receiver, v. H. W. Kloppenburg et al. Sams v. William Schneider. Consolidated. 482.

5. Plaintiff was the lessee of the plantation seized by these defendants as the property of one Mrs. Bell, the defendant in execution; and being the lessee, he was the owner of the seventy-seven bales of cotton raised by him on said plantation in 1869, which were seized and disposed of by defendants. That he was the lessee in 1868 can not be doubted. Whether the husband of Mrs. Bell had authority as agent to execute to him the lease for 1869 is immaterial, inasmuch as he remained on the place after the expiration of the lease of 1868, and continued to cultivate with his own means the plantation in 1869. The lease was continued by tacit consent. That plaintiff signed the injunction bond as security for Mrs. Bell, when she resisted the execution of defendants' judgments, does not estop him from claiming to be the owner of the twenty-seven bales of cotton involved in this controversy. There the ownership of the cotton was not at issue, the right of defendants to execute their judgments against Mrs. Bell being then the subject of inquiry. The mere seizure of the mortgage property in June, 1869, did not divest plaintiff of the title to the crop which he was raising on the plantation leased for 1869. That seizure in no manner disturbed him in cultivating the place. It was after plaintiff had shipped from the place sixty bales of cotton, and was about shipping the twenty-seven bales in dispute that defendants made the seizure and disposition of the cotton.

If the plantation had been sold by the sheriff pending the lease, under the mortgage previously executed, containing the *non alienando* clause, the sale would have dissolved the lease, and the purchaser could have taken possession. But it was not so. Under the circumstances of the case, the seizure of the cotton which belonged to plaintiff and the disposition of it was unjustifiable and wrong. *William Sandel v. D. B. Douglass, Sheriff, et al.*, 628.

LETTER OF CREDIT.

1. On the faith of a letter of credit given to them by defendants for \$5000, Fish & Butler procured the discount of a draft of \$3500, and some time afterward one of \$1500, from plaintiff, a banker in New York. On defendants being sued for payment of the latter draft, they rely on a defense which is merely technical. A letter of credit must be interpreted and effect given to it according to the real intention of the parties. In accomplishing that object, it was immaterial whether the drafts were drawn by Fish & Butler in favor of their respective creditors as required in the letter of credit, or in favor of the drawers themselves, to settle with said creditors, as intended, and as they did.

Both drafts were drawn alike, and when John Williams & Sons accepted and paid the first one for \$3500. they thereby conceded there was no objection to the form or wording of the instrument, and they interpreted the letter of credit as the drawers did, and as this court does.

Henry Talmadge v. John Williams & Sons, 653.

LEVEE DUES AND WHARFAGE.

1. The second article of the city ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans, approved February 11, 1853, which provides "that from and after the first of January, 1855, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as stated in said ordinance," is not in conflict with the provisions of the constitution of the United States.

J. W. Cannon v. City of New Orleans, 16.

2. In this instance a writ of injunction was issued by the Superior District Court, at the suit of the plaintiffs, restraining the city of New Orleans from enforcing any claim against them for pretended levee dues, wharfage, or port charges, and prohibiting W. L. Evans, a justice of the peace, from further proceeding in certain specified cases pending before his court.

An exception was correctly taken to the jurisdiction of the Superior District Court. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them.

Wm. G. Wilmot et als. v. The City of New Orleans et al., 158.

LEVEES AND LOUISIANA LEVEE COMPANY.

3. The purpose of the laws is clearly that the work of constructing, repairing, and strengthening the levees shall be done under plans, surveys, measurements, and directions to be furnished by a board

LEVEES AND LOUISIANA LEVEE COMPANY—Continued.

or commission of engineers, for the appointment of which the law provides, and the Louisiana Levee Company will not be held responsible in damages to individuals except in certain cases and according to the provisions recited in section 5 of act No. 4, of the acts of 1871, page 33.

N. Louque v. Louisiana Levee Company, 134.

4. It is in evidence that the Louisiana Levee Company, defendant in this case, made no contract with plaintiffs, the executors of Elder, but that said executors finished the work for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment. It is immaterial whether the succession of Elder was insolvent or not, as far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

White and Tomkins, Executors, v. Louisiana Levee Company, 295.

LIBEL.

1. The defendants in this case, by publishing the contents of an affidavit which was false and malicious, in the manner and with the comments they did, in a widely circulating newspaper, gave the false charges against the plaintiff an extensive circulation, and imparted to them an air of authenticity which they would not otherwise have had, and which this court may well suppose to have had a strong tendency to injure the character of the plaintiff. It is no justification to the defendants that they believed the affidavit to be true. Their belief in the truth of the charges tended rather to increase the bad effect of them against the plaintiff.

That the defendants have condoned for the publication of the offensive article in which this suit originated, by publishing an exculpatory letter of the plaintiff's attorney, affords no escape from the responsibility in damages to the injured party. The reparation of the injury, to the extent that the publication of exculpating and explanatory matter may be supposed to have made reparation, may be considered, and goes only in mitigation of damages. Thousands may have read the libelous matter that never saw its refutation.

It does not avail to say that the defendants had no malice or ill feeling against the plaintiff. In all cases of this sort, where the charge is false, the law implies malice in the publisher, not malice in the sense of hatred, spite or revengeful feeling toward the party assailed, but as showing an evil disposition, the *malus animus* which induced him wantonly, recklessly or negligently, in disregard of the rights of others to aid the slanderer in his work of defamation

LIBEL—Continued.

by giving to him the powerful influence of the public press—written or printed slander being justly considered more pernicious than that uttered by words only.

In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment.

James M. Cass v. New Orleans Times, 214.

2. Defamation by libel is the offense charged. Sections 804 and 1051 R. S. take this case out of the strict rules of the common law, and the purport only of the libelous letter as given in the information is sufficient. It was not essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation. The law of evidence upon this subject is complied with, if the matter or purport of the instrument offered conform to the purport and description thereof in the information. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

State of Louisiana v. H. H. Willers, 246.

3. Article 443 R. C. C. does not protect corporations from civil prosecutions for damages *ex delicto*. Corporations have been held responsible for acts done by their agents *ex contractu* and *ex delicto*.

A corporation may sanction the publication of a libel, and in such case the corporation is the publisher of the libel, and liable in like manner as an individual, not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action.

It is as possible for a corporation as for an individual to act maliciously, to wit: with a bad intent. Accordingly, it has been held that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as might imply malice in law sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity.

Benito Vinas v. Merchants' Mutual Insurance Company of New Orleans, 367.

LIS PENDENS.

SEE PRACTICE, NO. 2—*Wooldridge v. Montouse*, 79.

MANDAMUS.

1. There is nothing in the act for "funding the obligations of the State," relied on by relator, which confers on him or implies a right or duty, as "Fiscal Agent," to recover from the State Treas-

MANDAMUS—Continued.

urer, and to hold and account for, under the obligations of his official bond, all the moneys belonging to the State, or to choose a bank for such purpose, and nothing which imposes on said treasurer the duty to deposit said moneys with the relator, and therefore there is no cause for the mandamus prayed for.

It is only where a specific, ministerial duty is imposed by law on an officer, that the writ of mandamus can properly issue against him. The term "fiscal agent" does not necessarily mean depository of the public funds, so as, by the simple use of it in a statute without any directions in this respect, to make it the duty of the State Treasurer to deposit with him any moneys in the treasury and confer on such agent power to compel such deposit.

State ex rel. Baldwin v. Dubuclet, State Treasurer—State of Louisiana, Intervenor, 29.

2. Courts have no power to promulgate laws, and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and none within those of the judicial.

State of Louisiana ex rel. The Crescent City Waterworks Company v. P. G. Deslonde, Secretary of State, 71.

3. The plaintiff has failed to prove his allegations that there was, at the time of making his demand, money in the city treasury specially designated and set apart for the payment of judgments. Failing in this, he was clearly without the right to the proceeding by mandamus, even if he could otherwise have resorted to it.

State of Louisiana ex rel. Thomas Lynne v. John Calhoun, Administrator of Public Accounts et al., 167.

4. A mandamus will not lie against the Auditor to make an estimate and fix the rate of the tax provided for by act 69 of the acts of 1870. As long as this duty was imposed by law upon the Auditor, he could by mandamus be compelled to perform it. But when by acts 3, 4 and 55 of the acts of 1874, the law imposing this duty was repealed, and it was made a penal offense for him to do any act obstructing the funding of the obligations of the State and the other provisions of said statutes, a mandamus can not be invoked.

The question whether the State by her legislation on the subject has impaired the obligations of her contract with the relator, is a matter that can not be decided in this controversy, because the State is not a party to the suit, and the Auditor has no interest in

MANDAMUS—Continued.

the solution of the question. The same remark is applicable to the other constitutional objections raised by the relator.

State ex rel. John L. Macaulay v. Charles Clinton, Auditor, 429.

SEE APPEAL, NO. 34—*State ex rel. Mississippi and Mexican Gulf Ship Canal Company v. The Administrators of the City of New Orleans, 469*; AND NO. 49—*State ex rel. Newgass v. Judge of the Superior District Court, Parish of Orleans, 672.*

SEE BONDS, NO. 10—*State ex rel. Citizens' Bank of Louisiana v. Board of Liquidators, 660.*

SEE TAXES AND TAX COLLECTORS, NO. 13—*State ex rel. Norcross v. Judge of the Fourth District Court, Parish of Orleans, 704.*

MARRIED WOMEN.

1. The defendant, a married woman to the knowledge of the broker who negotiated the lease on which she is sued, being without authority to make the contract or to stand in judgment, and not being shown to be pursuing a separate business for herself, the plaintiff can not recover.

Widow Stewart v. V. M. Killmartin and J. B. Davis, 456.

MARKETS.

1. It does not follow because the city has leased the markets for the year 1874 that it loses all interest in the management of them and in seeing that the laws and regulations concerning them are carried into effect. The act of 1874 makes it the duty of the city, through its administrators, to take measures for carrying out the provisions of the act regulating private markets, and in any issue that may arise in acting under this authority the city would be competent to stand in judgment.

The Legislature had the power to make the regulation which it has made by the act of the twenty-sixth February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market. This power arises from the nature of things, and is what is termed a police power. It springs from the great principle "*salus populi suprema est lex.*" There is in the defendant's case no room for any well-grounded complaint of the violation of a vested right, for if he really possessed the privilege of keeping a private market, that privilege was acquired subordinately to the right existing in the sovereign to exercise the police power in regulating the peace and good order of the city, and in providing for and maintaining its cleanliness and salubrity. The act of 1874 is not unconstitutional.

The act of the twenty-sixth February, 1874, is not in violation of article 114 of the State constitution. The act has but one object;

MARKETS—Continued.

that one object is expressed in the title. The words "and for other purposes," are in the title to this act meaningless, for there is nothing else treated of in it besides the regulation of private markets.

The act of 1874 abolishes all private markets located within less than twelve squares of a public market. To that extent it repeals the act of 1866, under which the defendant sets up its title.

City of New Orleans et als. v. James Stafford, 417.

2. For carrying on a private market in contravention of the ordinances of the city of Shreveport, the defendants may be responsible to said city on account thereof. But plaintiffs, who are lessees of the public markets, have no right to sue to enforce the ordinances of that political corporation, nor can the validity of said ordinances be tested in this controversy to which the city of Shreveport is not a party.

Benjamin Jacobs et al. v. Benjamin Levy et al., 619.

3. In order to present the question whether the mayor of the city of Shreveport had authority to arrest and fine the plaintiffs in this instance but defendants in certain cases in which they were sued for carrying on a private market in contravention of the ordinances of said city, and the question being whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They can not test the authority of the mayor to enforce the ordinances of the city prohibiting private markets, and the legality of said ordinances, in a proceeding of this kind, to wit: by injunction and a claim of damages.

Benjamin Levy & Co. v. City of Shreveport et al, 620.

METROPOLITAN POLICE DISTRICT.

SEE TAXES AND TAX COLLECTORS, No. 11—*H. Gally v. Leopold Guichard*, 396.

METROPOLITAN POLICE WARRANTS.

1. The plaintiff, as a creditor and a taxpayer has no right to interfere in the administration of the municipal corporation of New Orleans, or to invoke the aid of the court to compel the city to collect license in money and not in Metropolitan Police warrants, as required by law. He has no direct pecuniary interest in the question raised. Hence, on this ground, the intervenors, holders of said warrants, who are the real parties whose rights are at issue, can object to this litigation and to the application of plaintiff for an injunction against the city. They have good cause to oppose the issuance of a proceeding prejudicial to them, at the instance of a party without interest to demand it. As the interests of the

METROPOLITAN POLICE WARRANTS—Continued.

city were not affected, she set up no serious defense, and it looks as if the judgment as to her was a mere consent judgment. The real controversy was with the intervenors.

Louisiana National Bank v. City of New Orleans et als., 446.

2. In precise terms, act No. 33 of the acts of 1874 makes Metropolitan Police warrants receivable for licenses throughout the Metropolitan Police district, and the relator in this instance clearly has the right to pay his license to the city of New Orleans in the warrants tendered by him.

In this statute there is no longer any limitation, as before, upon the receivability of Metropolitan warrants for licenses throughout the Metropolitan Police district, and the court can not decide that there is a limitation where the law has imposed none.

That New Orleans received in settlement of taxes and licenses due her prior to the enactment of the statute of 1874 more than the aggregate amount of her apportionment, is immaterial to the issue in this case. If she received more than the law required her to receive and suffers an inconvenience on account thereof, it is the result of her voluntary act.

Like every other holder of Metropolitan Police warrants, she can present the excess beyond the *pro rata* apportioned to her to the Metropolitan Police Commissioners for payment out of the money collected from the other cities, towns and parishes composing the Metropolitan Police district.

There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses, because that was virtually a consent judgment, and the rule is, such judgments are binding only on the parties.

State ex rel. Edward Lubie v. Administrator of Finance, City of New Orleans, 493.

MORTGAGE.

1. Nathaniel Montross, of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison to secure the payment of promissory notes on which this suit was brought. The mortgaged property was sold and adjudicated to plaintiffs. The amount due on the debt for which the property was seized was paid, and the remainder of the proceeds of the sale was retained to pay prior incumbrances. The city of New Orleans claimed as due for unpaid taxes against the property a certain sum of money with interest and costs and attorney's fees, and alleged the city's right to be paid in preference to any other creditors. The State tax collector for the First District of New

MORTGAGE—Continued.

Orleans excepted to the jurisdiction of the court, showed that the State has a first privilege upon the property for all taxes, and can not be called in as an ordinary creditor as aimed at by plaintiffs.

But Smith & Co., who held certain mortgage notes, drawn by Jamison and secured also by first mortgage, took executory proceedings against the said property which plaintiffs have enjoined. They have made parties to this suit as in a kind of *concurso*, the city of New Orleans, claiming a sum due for taxes, also the State tax collector of the First District of New Orleans, and Nathaniel Montross, holder of the notes and mortgage under which the property was sold, and they have prayed that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison, according to their respective rights of mortgage and privilege.

The court *a qua* maintained the exception of the State tax collector, gave judgment in favor of the city for a certain amount of taxes, with lien and privilege on the property, and dissolved plaintiffs' injunction.

The judge below erred only so far as he gave judgment in favor of the city for taxes. It would be in time after the execution of the order of seizure and sale now pending to present the claim for taxes, reserving to the city her right to be paid the taxes due out of the proceeds of the sale when made.

Hibernia National Bank et als. v. Samuel Smith et als., 59.

2. It appears from the mortgage certificate that the judgment of Dudossat, defendant in injunction, creates a judicial mortgage prior in rank to the judicial mortgage of plaintiff in injunction. The preference that Soulie acquired from a prior seizure of Ranson's property can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor. When sold, the property was adjudicated to Soulie, who refused to pay over the money to the sheriff, whereupon the sheriff was proceeding to resell the property when enjoined by Soulie on the ground that he had the right to retain the money in satisfaction of his judgment. This was wrong; Soulie should have complied with his bid; a *concurso* was his remedy. The sheriff was right when proceeding to resell, and the injunction was wrongfully taken.

Lehman, Newgass & Co., A. Dudossat, subrogated, v. Louis Ranson—On Injunction of Bernard Soulie, 279.

3. The property of a cotutor is not subjected to the legal mortgage of the minor. But by the term cotutor must be understood the person who becomes so by the fulfillment of the requirements of law.

MORTGAGE—Continued.

Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutorship *ipso facto*. In such a case, the children of a previous marriage have a legal mortgage on the property of the new husband for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

W. Bodein Keene v. George Guier and Sheriff, 232.

4. The obligations sued upon were entered into subsequent to the homestead law, and are therefore subject to it. These obligations novated a debt previously existing and secured by mortgage. Whether this original mortgage was valid or not for want of re-inscription is immaterial. It was abandoned and became inoperative by the consent of the original mortgagee, who received in lieu thereof the new obligations which are now sought to be enforced.

Robert J. Moore v. A. J. Beelman — Same v. Mrs. Laura J. Beelman—Consolidated, 276.

5. Where there is a total want of description of the situation of the thing mortgaged, the act of mortgage is invalid.

Keiffer Bros. et als. v. Isaac Starn et als., 282.

6. The only important question in this case is, could a judicial mortgage, resulting from the recordation of a judgment against the vendee, attach to the property sold, to the prejudice of the vendor's privilege and mortgage to secure the price, in consequence of the delay in recording the mortgage? The answer is negative. The mortgage and privilege were recorded in the parish of St. James, where the property is situated, simultaneously with the act of conveyance. As to third persons, the sale had no effect until it was duly recorded where the property is situated. It is certain that the creditors of the vendor might have seized and sold the property before the registry of the sale in St. James parish, free from any claim of the vendee's creditors, but if their judicial mortgage had attached as soon as the sale had been made this could not be.

Eugene Rochereau & Co. in Liquidation v. H. Octave Colomb, 337.

7. Whether, in this instance, the tutrix was indebted or not to her minor children, is a matter of indifference, inasmuch as their mortgage was not recorded, as required, by the first of January, 1870, but only on the ninth of May of said year.

John S. and Louise Skinner v. William O. Sibley, 392.

8. The plaintiff's claim is the result of a judgment which she obtained

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MORTGAGE—Continued.

against her father, which judgment gives to her a legal mortgage over all his immovable property, dating from the third of May, 1852. This judgment was inscribed on the sixteenth of April, 1868.

A judgment which recognizes a minor's claim and mortgage, and which is duly recorded prior to the year 1870, does not come under the 123d article of the constitution which declares "that tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, 1870, unless duly recorded," and the act No. 95 of the Legislature of 1869, which provides for carrying out the provisions of the aforesaid article of the constitution.

When the article 123 of the constitution was adopted, the plaintiff's rights were perfect. She had a tacit mortgage upon her father's property, and the evidence was a duly-recorded judgment of a competent court. There was no necessity for her to record it again. The article did not refer to her; she had complied with its requisites.

The rendering and signing of the plaintiff's judgment against her tutor, out of term time, did not, under the circumstances of the case, make it a nullity. It was agreed between the parties that the judge who tried the case should take it under advisement, render judgment, and sign it after the court should have adjourned. The parties were competent to make the agreement, and the judgment having been rendered in conformity to it is good.

The judgment of separation of property and dissolution of the community in a suit instituted by plaintiff's mother against her father, having never been executed or sought to be executed, was nothing, and did not affect the community.

The proceedings in which the plaintiff's father obtained leave of the court to give a special mortgage in lieu of the tacit one existing in favor of the minor, did not become final, because the mortgage after it was executed was not approved by the judge, and because it was not recorded in the parish where the property mortgaged was situated until after this suit was instituted, some ten years after the mortgage was given.

The vendor's privilege has no priority in this case over the plaintiff's tacit mortgage. The mere filing of the act of sale, which was passed in New Orleans, and the recording of it among the notarial acts of his office by the recorder of the parish of Pointe Coupee, was not the recording required by law in order to give it effect as a mortgage, or to preserve the privilege which it carried with it. Although subsequently recorded in the proper books of the recorder of mortgages, it was done within the time required to keep

MORTGAGE—Continued.

in existence the vendor's privilege, but operated only as a mortgage from the time it was recorded.

Plaintiff's tacit mortgage attached to the property purchased by her father from the day he purchased. The vendor's privilege was superior to the tacit mortgage so long as the privilege existed; but when the privilege ceased to exist, then the tacit mortgage was in force against it, and it had its effect without being recorded. When therefore the act of sale was recorded, it operated as a mortgage from that date, but at that time the property was burdened with the plaintiff's tacit mortgage, and the conventional mortgage was second to it in rank.

Mathilde Morrison v. Citizens' Bank of Louisiana and Sam Smith & Co., 401.

9. A judgment is not completed and can not operate as a judicial mortgage or have any effect until it is signed. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment.

Widow Elizabeth Marchal v. Harriet Hooker et als., 454.

10. On sixth February, 1857, Mrs. Pickett conveyed to Cummings the usufruct for life of the Chalk Level plantation by act under private signature. On twentieth November, 1865, Cummings mortgaged to Mrs. Pickett the Chalk Level plantation, A. H. Leonard accepting the mortgage as agent of Mrs. Pickett, who thereby, it is alleged, as well as those who might claim under her, was estopped from denying Cummings' title to said plantation, because she had accepted a mortgage from him and thus tacitly acknowledged him as owner thereof. On the twenty-fourth of November, 1866, Alter recorded a judgment which he had obtained against Cummings in the parish of Bossier. On third July, 1866, Mrs. Pickett mortgaged the Chalk Level plantation to Lee to secure ten notes for \$10,000 each.

On the second September, 1866, Mrs. Pickett, by act under private signature, renounced in favor of Lee the priority of her mortgage acquired from Cummings.

On the seventh of December, 1872, the Chalk Level plantation being sold at the suit of Lee and purchased by the Union Bank, the proceeds of this sale are now the subject of this controversy.

Prior to the sale, the Citizens' Bank, the Union Bank, and Mary B. Conner had filed their opposition, alleging that they held notes secured in the same mortgage from Mrs. Pickett to Lee, which said notes Lee had indorsed to them, and therefore they were entitled to be paid by preference over Lee out of the proceeds of the

MORTGAGE—Continued.

sale of the mortgaged property. Alter also filed a third opposition setting up his mortgage rights.

The inquiry is limited to the validity and extent of Alter's rights as against plaintiff and the opponents, the Citizens' Bank, the Union Bank, and Mary B. Conner, in relation to the proceeds of the sale. Cummings had no title from Mrs. Pickett which had effect as to third persons, because none was recorded in the book of conveyances in the recorder's office of the parish of Bossier. It was not disclosed to the public when the mortgage of Mrs. Pickett to Lee was granted, and there is no evidence that it has ever been disclosed by registry in the parish of Bossier where the Chalk Level plantation is situated. The registry in the mortgage book would be good for a mortgage, but would be no registry for a title. Therefore the mortgage granted by Mrs. Pickett on the second of July, 1866, to Lee on the Chalk Level plantation, the title of which stood on the public records in her name, is not defeated by the judicial mortgage of Alter against Cummings.

As mortgagee of the usufruct which Mrs. Pickett attempted to create in favor of Cummings, Alter is equally unfortunate. The registry of his judgment against Cummings did not give him a mortgage on the right of usufruct of the Chalk Level plantation. The act granting it is an act under private signature, and therefore invalid as a donation. It is not good as a sale or a giving in payment, as there was no price stated in the act.

If, however, Cummings had the right of usufruct, and Alter, by the registry of his judgment against him, had acquired a mortgage thereon, Alter should have asked a separate appraisal prior to the sale, in order that his part of the proceeds should be ascertained with legal certainty.

Thomas B. Lee v. E. O. Cummings and Pauline Pickett. Charles E. Alter et als., Interveners, 529.

11. The peculiar principles upon which the Consolidated Association of the Planters of Louisiana was organized, the important purposes it was intended to subserve, and the enduring character which was required to be given to it, rendered essentially necessary that the enforcement of its obligations should not be defeated or delayed by pleas and defenses admissible in regard to ordinary hypothecations. The important interests of the State were also to be protected.

It is a pre-eminent feature in the charter of the Consolidated Association of the Planters of Louisiana that no future change of Althenship or possession of the property mortgaged to secure the corder subscribed or the loan made should ever prevent or delay

MORTGAGE—Continued.

the enforcement of the mortgage against the property, to collect whatever sum might be due by the original mortgager. It was on these conditions that the State became the indorser on the bonds issued by this association in 1828. There is no place for delays or calls in warranty, nor operation of prescription of its debts, or peremption of its mortgages.

Reference must be made in this instance to Civil Code, article 3333, amended by act of 1842, which declares "that the rule requiring the reinscription of mortgages at the expiration of ten years from date of their registry shall not apply to the mortgages which have been or may be given by the stockholders of the various property banks of this State."

The Consolidated Association of the Planters of Louisiana v. John W. Mason et als., 535.

12. It has often been held that a defendant appearing to except to the citation can not at the same time urge any matter of defense.

The court *a qua* did not err in rejecting the document offered by defendant to show that the plaintiff was a bankrupt, and therefore not entitled to enforce certain judgments on which his suit is based, because the instrument was from the United States District Court of another State, and was not authenticated according to the act of Congress.

The defendant was without interest to contest with plaintiff when he set up that the entries of his lands, against which the hypothecary action of the plaintiff is instituted, had been canceled, and said lands belonged to the United States. This defense puts him out of court.

The defendant's discharge in bankruptcy relieved him from personal liability, but it did not remove the mortgage which plaintiff had previously acquired on the lands. When the defendant, subsequent to his discharge, bought the lands which he had surrendered subject to the liens existing thereon, they remained liable to the hypothecary action which plaintiff has brought against them.

S. S. Heard v. B. P. Patton, 542.

13. After a wife has obtained a separation of property from her husband, and has executed it, and has assumed the administration of her estate, it would be a fraud upon the public to permit her to acquire a legal mortgage upon the property of the husband, acquired by him subsequent to the judgment of separation, by allowing him to manage her property and spend her money. He must be presumed to have acted as her agent, and as such he owes her an account of his administration, but his acts create no mortgage on his estate.

MORTGAGE—Continued.

Mrs. Gayle, the administratrix, having occupied a house which was the separate property of her husband, and which belonged to his succession, must be charged with the rent as any third person would be.

Neither by separate nor combined action can the administratrix and attorney of the succession impose an onerous charge upon an estate by the employment of counsel, when the estate is already provided with a competent legal adviser. If the administratrix chooses to employ additional counsel, she must pay him out of her own funds.

In matters of opposition to succession accounts all the parties are plaintiffs and defendants, and each opponent must make out his case by proper and sufficient proof.

The reinscription of a mortgage after the peremption, subsequent to the death of the mortgager, does not affect the property of the succession with a mortgage.

The opposition to the failure of the administratrix to the account for amount of notes given for the purchase of property sold on the Stevens plantation must be maintained. The proposition that the balance due Mrs. Stevens for rent exceeds the amount of these notes is inadmissible. The notes were given for property belonging to the succession. It was the duty of the administratrix to collect them, and to place the proceeds on her account, leaving it to the parties in interest to claim their right of preference over the proceeds.

Succession of Gayle, 547.

14. After a mortgage has once perempted it can not be revived against a succession by the registry thereof after the lapse of ten years. No preference over ordinary creditors of a succession can be gained in that way.

Martha J. Sorrels and Husband v. James M. Stamper, 630.

15. Powell effected a four months' loan with the New Orleans Banking Association, and gave as collateral security four notes, with mortgage on his property. On the maturity of the four months' loan, Powell, not having money to pay said loan, applied to Low & Ludwigson for a loan to pay the bank, which was furnished on condition that the twelve months' notes pledged to the New Orleans Banking Association should be delivered to them as collaterals. Powell's debt to the bank was paid with the money thus borrowed and the collaterals were delivered by the bank to Ludwigson, who pledged them to the Mechanics' and Traders' Bank, plaintiff in this suit, for a debt of Low & Ludwigson.

After the transaction aforesaid the mortgage rights of the third opponents arose. This court thinks that the third opponents er-

MORTGAGE—Continued.

roniously contend that the payment by Powell of the four months' loan extinguished the mortgage given to secure the twelve months' notes, now in suit. Practically, the original debt to one creditor was extinguished by the substitution of another creditor, upon the express condition that the security should be continued as it then existed. It was clearly not the purpose or intention of Powell to extinguish the mortgage, and the manner in which the evidence thereof was delivered to the new creditor did not have that effect.

Mechanics' and Traders' Bank v. Jesse R. Powell. James E. Zunts and Samuel R. Bertron, Third Opponents, 647.

16. The question in this instance is whether certain articles found on a mortgaged tract of land, seized and sold by plaintiff and adjudicated to him as part of the mortgaged property, were covered by said mortgage, and in that case whether they could be afterward seized, advertised and sold by defendant individually and as testamentary executor of the late William Bobb. The decision of this court is in favor of the plaintiff, on the grounds that the objects now in litigation were found on the premises seized; that they were used in carrying out the industry to which the real estate was subjected, and therefore that said property in dispute was properly seized, advertised, appraised and sold as subject to the mortgage of the plaintiff, to whom it was adjudicated on the sale thereof.

Albin Rochereau v. Charles P. Bobb, Individually and as Testamentary Executor, et al., 657.

SEE PRIVILEGE, No. 6—*Bank of America v. Fortier, 243.*

SEE JUDGMENT, No. 7—*Alexander Lirette v. John Carrane, 298.*

SEE DATION EN PAIEMENT, No. 1—*E. Newman & Co. v. John Eaton and Wife, 341.*

SEE BILLS AND PROMISSORY NOTES, No. 14—*Gardner v. Maxwell, 561.*

SEE LESSOR AND LESSEE, No. 5—*Case v. Kloppenburgh, 628.*

NATURAL CHILDREN.

1. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the Use of, et al., v. Succession of Patrick Halpin, 382.

OBLIGATIONS AND LIABILITIES.

1. Where one of two innocent persons must suffer a loss through the misconduct of another, the loss ought rather to fall upon him who put it in the power of the third party to inflict the injury.

Mahan v. Dubuclet, State Treasurer, 45.

OBLIGATIONS AND LIABILITIES—Continued.

2. This is a suit to recover the amount of losses sustained in consequence of incorrect information given by defendants, in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York. The defense is, that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company placed for convenience in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. This does not exonerate them from liability, because by their contract they were bound to carry to plaintiffs correct information, which they could have obtained without relying on the indicator.

Bank of New Orleans v. Western Union Telegraph Company, 49.

3. Plaintiff was the owner of the property on which he made certain improvements, repairs, etc., for the reimbursement of the value of which he now sues. It is true that this ownership existed only during the lifetime of John Slidell, from whom it had been taken by forfeiture and confiscation. Still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted he could no longer set up possession in good faith.

Joseph Brugere v. The Heirs of John Slidell, 70.

4. The plaintiff sues defendant for a certain sum of money on a contract of affreightment concerning the transportation of staves, for which he signed a bill of lading. After signing, he protested against it. This was too late. If his allegations are true, he should not have signed the bill of lading, or if he did, he should have protested at the time.

James S. Rogers v. Robert Roberts, 85.

5. The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience according to the passenger's condition in life and the journey undertaken by him, and for such sum as might be deemed necessary for his expenses.

Mrs. Ellen Yznaga Del Valle and Husband v. Steamboat Richmond and Owners, 90.

6. This is a suit on a mortgage note drawn by defendant, and lost *in transitu* from New York to New Orleans, to which latter place it

OBLIGATIONS AND LIABILITIES—Continued.

had been sent for collection. The Citizens' Bank of Louisiana offered him a bond of indemnity if he would pay the note at maturity, which he declined. Under this statement of facts;

Held—That the defendant is liable for the interest due on the note from the maturity thereof, for counsel's fees, and for the costs of the act of mortgage. He could have avoided them all by depositing or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default. But he is not liable for the costs of advertisement for the recovery of the lost note, as he can not be made to pay for either the misfortune or the negligence of plaintiff.

Citizens' Bank of Louisiana, for the Use of the Phenix National Bank of New York, v. John Baltz, 106.

7. The Teutonia National Bank was clearly without right to hold Loeb & Co.'s note, pledged to secure a particular debt of Gretzner, Winehill & Co., on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co., with them, offered to pay and take up the note of the last-named parties the bank upon receiving payment in full for that note should have surrendered the collateral.

Teutonia National Bank of New Orleans v. H. Loeb & Co., 110.

8. The proprietor of a building leased to a tenant is not liable in damages to third parties resulting from the use to which the tenant may put the leased property, unless it be shown that, at the time the lease was made, he knew the uses and purposes the tenant would apply it to, and that such use, from the nature of the business, would prove a nuisance.

Michael Muller v. H. L. Stone and Willos & Rostand. Mary Catherine and William Muller, Interveners, 123.

9. The city is not responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

Spalding v. City of Jefferson, and Purdon v. The City of New Orleans et al.—*Consolidated*, 159.

10. In this case the act of the officers of the city and the men in their employ being a trespass upon the plaintiff's property, for this the law holds the corporation liable. A judgment in favor of the city of New Orleans, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decree.

The Pontchartrain Railroad Company v. The City of New Orleans, 162.

OBLIGATIONS AND LIABILITIES—Continued.

11. This is a suit to recover the penalties stipulated in two charter parties, for the violation thereof, in relation to voyages to be made by two different vessels.

The putting in default was sufficient as to one of the vessels, but there is no proof that either of the modes for putting in default pointed out in article 1911, R. C. C. No. 2, was observed in relation to the other vessel, until the day the contract expired, when it was impossible for the vessel to execute her voyage on, or previous to, that day. The defendants are therefore liable jointly and *in solido*, as they bound themselves, only for the infraction of the contract as to one of the vessels. *Henry Eden v. F. Lemandre et al.*, 176.

12. Plaintiff claims a certain amount of money alleged to have been loaned to defendant. The conduct of plaintiff, under the circumstances of the case, is such as not to leave it free from the suspicion that it was regulated so as to insure, under the guise of a loan, the payment of the losses of defendant in a gambling-house kept by plaintiff, when the payment of said losses could not directly be enforced on account of immoral consideration and from the violation by the parties of a prohibitory law. Courts of justice are not open to litigation of this kind.

H. J. Sampson v. Norman Whitney, 294.

13. It is in evidence that the Louisiana Levee Company, defendant in this case, made no contract with plaintiffs, the executors of Elder, but that said executors finished the work for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment. It is immaterial whether the succession of Elder was insolvent or not, as far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound, for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

White and Tompkins, Executors, v. Louisiana Levee Company, 295.

14. This is a suit personally against a tutrix, one of the defendants, on six mortgage promissory notes given by her, and also as representing those of her children who were minors when the suit was brought, and the majors who joined in the act of mortgage, for the amount of the notes sued on, and for a decree of lien and privilege on the property mortgaged. The defendant, one of the heirs, a minor when judgment was rendered, but now of age, appeals from said judgment.

The motion to dismiss defendant's appeal on the ground that all his joint obligors have not been cited and made parties to the appeal, can not prevail. He is not a joint obligor: his liability is as heir

OBLIGATIONS AND LIABILITIES—Continued.

to his father, and his liability is fixed by his interest in his father's succession.

When the father of the appellant died, he was largely in debt. The representative of his succession, in order to pay off his indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness. Hence the notes now sued on. This was not the creation of a debt; it was the acknowledgment of one and providing means to pay it—all of which was done in the interest of the heirs. The appellant's liability, therefore, is fixed by his interest in his father's succession. To the extent of that interest the judgment binds him, but to nothing more.

Vernon K. Stevenson v. Lavina Edwards et al., 302.

15. At the time of the discount of the note which is the subject of the present controversy; Hunter, one of the firm of Callender & Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender, the plaintiff, and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender. If Callender had given him verbal authority, as contended by defendants and intervenors, the authority was revoked before exercised. But, even without a revocation, Hunter had no authority to indorse and discount the note in question.

Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees acquired none, because they had notice of the want of authority in Hunter to indorse and negotiate it.

B. K. Callender v. Golsan Brothers. Jackson & Manson, Warrantors and Intervenors, 311.

16. The amount due for unpaid stock must be paid. It is no defense to allege that the penalty for not paying said amount is the forfeiture of the stock.

New Orleans, Florida and Havana Steamship Company v. E. B. Briggs, 318.

17. From the evidence in this case, the relations of the two defendants in warranty toward the plaintiff must be regarded as being something more than those of brokers. Their functions and obligations did not cease upon merely bringing together the parties that were to contract and leaving them to arrange their business as they saw best. They must be regarded in the light of mandatories and as having assumed themselves this character, in consequence of which they were bound to use the same diligence and

OBLIGATIONS AND LIABILITIES—Continued.

precaution to prevent fraud being practiced upon the plaintiff that a prudent man would use in regard to his own affairs. Their not having done so, makes them responsible for the consequences of the fraud, which they could have detected and defeated by ordinary diligence.

Mrs. Jane H. H. Todd v. John Bourke. Van Solingen & Carpenter, called in warranty, 385.

18. He who sells a credit or incorporeal right warrants its existence at the time of the transfer. The seller does not warrant the solvency of the debtor, unless he has agreed to do so. There is no lesion in such sales, and no relief can be granted.

Milton Benner v. Warner Van Norden et al., 473.

19. Creditors may become parties to an assignment in other ways than by actually signing the instrument, as by coming in under it for the purpose of obtaining a dividend. In this instance the plaintiffs were informed of the terms and conditions on which the defendants had assigned their property to their creditors, and they accepted their *pro rata* from the assignee without reservation, and thereby made themselves parties to the agreement. They ought not to be permitted to enjoy the benefit of a compromise, and at the same time repudiate all its obligations.

Wallace & Co. v. Cumming & Morrison, 631.

SEE DAMAGES, No. 1—*Johnson v. Canal and Claiborne Streets Railroad Company, 53*; AND No. 9—*LeBreton v. Kennedy, 432.*

SEE SURETY, No. 1—*Gulver, Simonds & Co. v. Leovy, Hart & Co., 58.*

SEE ATTACHMENT, No. 2—*Block, Britton & Co. v. Barton, Miller & Co., 89*; AND No. 5—*Joseph Moore v. Sallie Pope and Husband, 254.*

SEE PARTNERSHIP, No. 6—*Wild v. Erath, 171.*

SEE PRIVY, No. 1—*Martin Kenopski v. Mark Davis et al., 174.*

SEE CONTRACT, No. 2—*Payne & Harrison v. Mrs. Stackhouse, 185.*

SEE SUCCESSION, No. 1—*Hunt v. Graves, 195.*

SEE BILLS AND PROMISSORY NOTES, No. 9—*Gay & Co. v. Deynoodt et al., 249*; AND No. 16—*Fuller v. Leonard, 635.*

SEE ASSUMPSIT, No. 1—*Lapene & Ferre v. Delaporte, 252.*

SEE FACTORS, No. 1—*Banning v. Blakely & Co., 257.*

SEE CHECKS ON BANKS, No. 1—*Mrs. Burke v. Mrs. Bishop et al., 465.*

SEE VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY, No. 1—*Chaffe Bros. v. John T. Ludeling et als., 607.*

SEE CORPORATIONS, No. 3—*State ex rel. Haven v. City of Shreveport, 623.*

SEE OFFICES AND OFFICERS, No. 11—*Levisce v. Shreveport City Railroad Company, 641.*

SEE PLEADINGS, No. 5—*Spears, Liquidator, v. Spears, Administratrix, 642.*

SEE LACHES, No. 1—*Bogart Shall et al. v. Foley et al., 651.*

OFFICES AND OFFICERS.

1. The State ex rel. Elias George instituted suit against Tucker, under the intrusion act, to recover the office of recorder of the parish of Tangipahoa. While that suit was pending George sued Tucker and enjoined him from recovering the fees of the office. The injunction was set aside on Tucker giving a release bond with sureties. There was judgment against Tucker for the fees, George having been declared entitled to the office in the suit of the State v. Tucker. The plea set up by Taylor, surety on the release bond, that George could not sue for his fees of office without the interposition of the Attorney General or district attorney in his behalf, can not be maintained.

The State having instituted proceedings to oust the intruder from the office and to install George therein, there is no good reason why George should not have taken all necessary steps to preserve his rights to the fees of the office to which he had the legal title. The State was interested in seeing that no one should intrude into a public office, but it had no interest in the fees of the office.

Elias George v. A. G. Tucker and B. F. Taylor, 67.

2. It can not be doubted that the intention of the law is that the city attorney must be elected biennially by the council. It is also clearly stated in the city charter that his term of office is two years.

Under the law the council can only elect a city attorney on the third Monday of November, or as soon thereafter as practicable, and unless the term expires biennially at that time this duty could not be performed by said council.

The term of office of the mayor and administrators began on the first Monday of November, 1870, and continued for two years. That of the city attorney, the surveyor, and the recorders began on the third Monday of November, at which time the law required these offices to be filled by an election for two years.

With a view to give effect, if possible, to every part of the law, it must be concluded that the government established when the city charter went into operation in April, 1870, was a temporary organization, and that the permanent government began after the election of the mayor and administrators on the first Monday of November, 1870.

Under this construction full effect can be given to that provision of the charter making it the duty of the council to elect a city attorney at the first regular meeting after its induction into office. This could not be done if the term of the city attorney began with the temporary organization in April, 1870, and continued for two years. The law clearly contemplated a vacancy and the beginning

OFFICES AND OFFICERS—Continued.

of a new term at the time required for the election. Otherwise, that election which was imposed as a duty on the city council could not have been performed—which would have been an absurdity. Hence it follows that the election of defendant by the council, as city attorney, on the fifth of December, 1874, was valid.

State ex rel. Attorney General et als. v. B. F. Jones, 179.

3. In this controversy for the office of coroner, under section 1419 of the Revised Statutes, the exception that the suit was not brought within ten days after the election must prevail.

James Madison v. James Dyer, 305.

4. Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within that delay, or the action, if excepted to, will be dismissed. In this instance the suit should have been brought *within ten days after the election*. The court below erred in not maintaining the exception of the defendant on that ground. The law is not ambiguous, and no room is left to the discretion or equity powers of this court; it must, therefore, be administered as it is, however unwise some of its provisions must appear.

J. L. Belden v. Thomas P. Sherburne, 305.

5. It is not to be discovered in the record nor is it possible to imagine what office O. J. Flagg held that constituted him "*ex-officio committing magistrate*," and that entitled him to draw a salary from the parish of St. Charles. If as district judge he discharged the duty of a committing magistrate, he was clearly entitled to no compensation from the parish, because the salary paid by the State is all that he can rightfully receive.

Letitia Babbington v. The Parish of St. Charles, 321.

6. Act No. 92 of the acts of 1869, under which Dr. Cooper claims title as police surgeon of the Metropolitan force, fixes the term of the office, in the ninth section thereof, as being during good behavior. Act No. 60 of the acts of 1874 in no manner proposes to amend act No. 92, so as to change the term of office. The act of 1869 remains in force, with this limitation, however, resulting from act No. 60, that the police commissioners, in reducing the police force, may "honorably discharge such members as in their judgment may seem needful." Thus, under this amendment they could have discharged Dr. Cooper, but they had no warrant to remove him as they did, merely to appoint Dr. Schumaker. Power granted for one purpose can not be employed for another.

State of Louisiana ex rel. Attorney General on Information of Dr.

J. B. Cooper v. Dr F. Schumaker et al., 332.

OFFICES AND OFFICERS—Continued.

7. The judgment of the court in this case is based entirely on the one already rendered in the case of *Claiborne v. Parlange*, the facts being substantially the same. 26 An. 548.

The State ex rel. J. O. Keale v. Isaac H. Crawford, 439.

8. This suit originates in a claim against the city of New Orleans for salary and fees of office as clerk of the Superior Criminal Court, in alleged conformity with the second section of the act of 1874, establishing said court and providing for the clerk thereof. The act says that for issuing any process, the fee whereof is not determined by law, the judge of the court shall fix the compensation to which the clerk is entitled, in addition to his regular salary.

Process is so denominated, because it proceeds, or issues forth in order to bring the defendant into court to answer the charge preferred against him, and signifies the writ or judicial means by which he is brought to answer.

Motions made by the Attorney General, copies of indictments, etc., are not process. These are services, which seem to be paid for by the fixed salary of five thousand dollars allowed by the act.

The judge of the Superior Criminal Court has no power to certify the costs of any thing but process for which no provision has been made in the statute. The charges in this case were not for the issuing of any process. The judge, therefore, under the statute, had no power by his certificate of their correctness to make them a liability of the city, and his approval was binding upon no one.

John Fitzpatrick v. The City of New Orleans, 457.

9. M. A. Sweet was returned as elected recorder by the board created by law to ascertain that fact, and the commission issued by the Acting Governor is conclusive of that fact in all cases except where the election has been contested within the time fixed by law. Therefore the subsequent appointment of Jackson by the Governor was made in error, and is null and void.

Whether the oath of office of Sweet was taken and recorded in the office of the Secretary of State or not did not authorize the Governor to treat the office as vacant.

The State ex rel. J. E. Leonard, District Attorney, et al. v. Ed. Jackson, 541.

10. This is a contest for the office of recorder of the parish of West Feliciana. The vacancy having occurred when the Senate was not in session, the nomination to fill the same was properly made at the called session which was the "next session" after the vacancy occurred. To fill this vacancy the Governor had the power to nominate whom he pleased, and this without regard to any appointment he had made during the recess.

State of Louisiana ex rel. Jacob A. Meyer v. Joshua Van Tromp, 569.

OFFICES AND OFFICERS—Continued.

11. When plaintiff undertook to perform for the company a service not strictly within the sphere of his duties as president thereof, he should have required a stipulation for remuneration for said service, if he expected it from the company. He was the president, acting within the scope of his authority in directing the construction of certain works. He had no right, however, to employ himself as a master builder and expect a good salary.

In regard to the expenses for constructing a depot, there was a full settlement between plaintiff and defendant, and if plaintiff's account now presented is valid, it should have been embraced in that settlement, there being no allegation of error.

A. B. Levisse v. Shreveport City Railroad Company, 641.

12. This suit is brought under the intrusion act. From all this court is able to gather from this record, the relator has no cause of action. This court does not understand that defendant has usurped or intruded into the office of recorder, or placed it out of the power of relator by any unlawful force or any illegal means to perform the duties of recorder, if legally vested with that power. He claims, as mayor, the right to exercise certain functions which the relator claims as belonging to the office of recorder. It is not seen how the relator can maintain his action as one coming under the provisions of the law for preventing the usurpation of or intrusion into an office.

State ex rel. A. A. Milliken v. S. J. Ward, 659.

13. The statute No. 124 of the General Assembly of 1874, conferring on the judge of the Superior Criminal Court the power to appoint an attorney to act in his place, is unconstitutional, because it provides a mode for choosing judges different from that prescribed in the constitution.

It would be obnoxious to an additional objection, if the assumption of the State is correct, that Braughn, the attorney appointed by the judge of the Superior Criminal Court to act in his place, was a *de facto* officer. In that case, the statute would provide for having two judges for the Superior Criminal Court, whereas article 83 declares "that for each court, one judge learned in the law, shall be elected."

Instead of authorizing the enactment of section 10 of act No. 124, article 90 of the constitution forbids it in terms of command. It directs the judge when and how he shall select another to preside in his place. Obviously this article did not confer any power upon the General Assembly; but, by indicating precisely how and when the judge shall select another to preside in his stead to try certain causes, it excludes other modes of selection and other causes; and

OFFICES AND OFFICERS—Continued.

as the manner of choosing a judge, provided for in section 10 of act No. 124 differs from that prescribed in article 90, the said section is null and void. *State of Louisiana v. Pete Phillips*, 663.

14. The provision of the statute under which Judge Atocha appointed a lawyer, George H. Braughn, to preside in his court and try defendants, being repugnant to article 90 of the constitution, was void from the beginning of its enactment and the appointment was a nullity.

The express requirement of article 90, that the judge shall select a lawyer to try a certain class of cases, carries with it an implied inhibition against the judge selecting or appointing a lawyer to act in his place and stead in the trial of any other cases.

The defendant was therefore tried and sentenced in the Superior Criminal Court during the absence of the judge of that court, and without any competent judge presiding at the time. The attorney who presided had no more authority to act as judge than any other person who was present at the trial.

The position that Braughn was a *de facto* judge and that his official acts were valid, is not tenable. He had no color of title to the office of judge of the Superior Criminal Court, and never claimed or pretended to be judge of that court.

The State of Louisiana v. George Fritz alias Fry and Frank O'Brian, 689.

SEE COMPENSATION, NO. 1—*City of New Orleans v. Fassman et als.*, 650; AND NO. 2—*City of New Orleans v. Finnerty*, 681.

PARTNERSHIP.

1. The defendant objected to this action on the ground that the petition disclosed a partnership, and between partners only an action for the settlement of the partnership will lie.

The court *a qua* erred in overruling the exception. The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer Ella May. The objection to the form of the action should have been maintained. *Radovich v. Frigerio*, 68.

2. This is a suit brought against defendants and various other persons named in the petition, who, as the plaintiff alleges, composed a partnership entered into for the purpose of purchasing and owning the Mississippi Cotton Press and the Branch Press, forming part of the same, which property was bought by Felix J. Forstall, now deceased, but then one of the copartners, acting as the representative of said copartnership and using his name as a firm name to represent the same.

The notarial act by which the plaintiff conveyed title to the prop-

PARTNERSHIP—Continued.

erty shows simply that the plaintiff sold to Felix J. Forstall. There is nothing that shows privity between the plaintiff and these defendants. If between Felix J. Forstall and the defendants there existed an agreement by which the property was to be paid for and owned in common by them, the plaintiff shows nothing authorizing the conclusion that he considered the defendants bound to pay him any thing on this contract. He seems by the terms of the sale to have looked only to Felix J. Forstall, and the mortgage and vendor's privilege upon the property sold. The act of sale contains nothing that warrants the belief that Felix J. Forstall acted as an agent for any person.

Jean B. Letorey v. Edmond J. Forstall et als., 83.

3. The demand in this case being in the alternative, there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the partnership assets, or alleged to be a part thereof, when, in truth, they were not so alleged to be.

Thomas E. M. Smith v. Patrick Donnelly, 98.

4. Where a rule was taken to set aside an attachment, on the ground that the suit was based on a partnership transaction, and therefore plaintiff was not entitled to an attachment, for the reason that he could not swear to the amount due, until the rights of the partners should be settled according to law ;

Held—That the term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants. The objection to the attachment, on the ground alleged, is therefore not well founded.

Where the question was whether the allegations in the petition and in the affidavit were sufficient to warrant the issuing of the writ of attachment, and the plaintiff prayed for judgment for \$3500, or such amount as should be found due according to said allegations, and where the affidavit was that "all the facts and allegations in the above and original petition were true and correct, and that the defendants were disposing of their goods, rights and credits, with intent to defraud their creditors;"

Held—That the allegations were sufficient, and that the affidavit was in conformity with law. *Frederick Belden v. Bead & Hunt*, 103.

PARTNERSHIP—Continued.

5. A bill of exceptions being taken to the admission in evidence of a notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumpsit of the debts of an old firm by a new one, which it was the object of the evidence to establish;

Held—That the evidence was properly admitted. The defendants, by pleading a general denial, put at issue the question of their liability to pay the note sued upon, and the plaintiff had the right, by proper evidence, to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper. If by an agreement *inter se* a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement.

Henry T. Cottam v. George H. Smith & Co., 128.

6. In this case the notes given by defendant for the price of a certain piece of property were made the debt of the firm composed of plaintiff and defendant by the act of partnership and purchase, but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are the individual debt of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm, nor would the payment of said notes out of the interest of each partner in the partnership have such effect.

Jacob F. Wild v. Albert Erath, 171.

7. During the existence of a commercial partnership service on one of the members is good against all, but after its dissolution any member intended to be sued must be served with a separate citation.

The supplemental answer of Wheless, in which he claims, in reconvention, judgment against Anderson for an amount alleged by him to be due to the firm of Wheless & Pratt, of which firm he asserts himself to be the liquidating partner, does not authorize a judgment on Anderson's original demand against Pratt, who was not cited.

John Anderson v. J. I. Arnette and Wheless & Pratt, 237.

8. Defendants, who were members of the late commercial firm of Cornwell & Hays, refuse payment of a note of said firm which was executed to plaintiff, separate in property from her husband, before said separation had taken place. Previous to the existence of the firm of Cornwell & Hays, there existed the firm of L. S. Cornwell & Co., which owed plaintiff borrowed money to the amount of the

PARTNERSHIP—Continued.

note in suit. In liquidation of this debt of L. S. Cornwell & Co., the liquidating partner of that firm gave plaintiff the note sued on, having previously consigned to the factors of said Cornwell & Hays forty-four bales of cotton belonging to said firm of L. S. Cornwell & Co. in liquidation. The proceeds of this cotton, exceeding the amount of the note, passed to the credit of Cornwell & Hays on the books of their factors. Thus, the liquidating partner of L. S. Cornwell & Co., instead of paying over to plaintiff the sum which was due to her, passed that sum, the proceeds of the cotton, to the credit of Cornwell & Hays, and executed to plaintiff the note of the last-named firm, of which he was a partner. Therefore the firm of Cornwell & Hays received a valuable consideration for the note, and plaintiff's claim is established.

It is shown that the money loaned by plaintiff was her paraphernal property. Whether or not the husband was a member of either firm, or both the aforementioned firms, is immaterial.

The plaintiff is not bound by statements made out of her presence by the partners at the partition of the partnership of Cornwell & Hays.

Carrie A. Drake and Husband v. Thomas P. Hays et als, 256.

9. If a debt be contracted by one of the partners of an ordinary partnership who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction, which is proved in this case.

Lagan & Mackinson v. George D. Cragin, 352.

10. The plaintiff in execution against a defendant who is a member of a partnership has the undoubted right to seize and sell under his writ the interest of the owing partner in the partnership property. But his rights stop there. His execution neither dissolves the partnership nor authorizes the appointment of a receiver with power to liquidate the partnership affairs.

Choppin v. Wilson et al., 444.

11. The specific credits of a partnership, as in this case, can not be seized under execution against one of the partners, or the surviving partner. The entire interest of a partner may be seized and sold, but no specific asset, credit, or property of the partnership is liable to seizure under execution against one of the partners.

Levy & Sugar v. Gowan & Mayo, 556.

PILOTS

1. The rules and regulations of the United States Board of Supervisors do not specify and particularize the short bends and points at which certain precautionary signals are to be made by steamers.

PILOTS—Continued.

In the absence of such specification by the board, it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places where, by the rules and regulations governing pilots, signals are to be given.

A transcript of the proceedings before the United States inspectors, in relation to the sinking of the steamboat *Texarkana*, which gave rise to this suit, embracing the evidence taken on that occasion, was offered on the part of defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios* and irrelevant. The court *a qua* sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. The court did not err. The action taken by the board of inspectors could not bind the plaintiff who was not a party to it.

Kennett & Bell v. Union Insurance Company of New Orleans, 26.

PLEADINGS.

1. If the description of the instruments sued on was materially defective, the plaintiffs should have been allowed, under the circumstances of the case, an opportunity to amend before their suit was dismissed. But although the petition is loosely constructed, the documents being made a part thereof supply a deficiency therein in relation to their nature and contents, and the only consequence of a failure to file them at the time of filing the petition is, that the defendant may refuse to answer until he has *oyer* of them.

Police Jury of the Parish of Pointe Coupee v. A. L. Mahoudeau et als., 224.

2. The intervention is dismissed. The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

If the intervenor had a lessor's privilege, it should have been asserted before the sequestered property was released on bond. No fraud and collusion are shown between the plaintiffs and the defendant.

The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued.

D. B. Carroll & Co. v. H. T. Bridewell. Mrs. Lizzie Hamilton, Intervenor, 239.

3. This court can not sustain the bill of exceptions taken to the ruling of the judge *a quo*, permitting the plaintiff to amend his petition by correcting the allegation in regard to the dates of the notes sued on, on the ground that it came too late, as the trial had commenced. Amendments should always be allowed when justice

PLEADINGS—Continued.

would be subverted thereby. If the defendant was taken by surprise, he might have obtained a continuance on that ground.

Bussey & Co. v. J. A. Rothschild, 316.

4. The pleas of want of citation and prescription are inconsistent. Pleading prescription is an appearance.

Nicholson & Co. v. Mrs. A. M. Jennings, 432.

5. As the plaintiff, W. L. Spears, resided in the parish of Claiborne, and could only have been sued there on claims against the firm of Spears & Ramsey, which he assumed to pay at the dissolution of said firm, the defendant had the right to set up the reconventional demand, which is objected to.

Whether the plaintiff owns certain claims and the notes attached to his petition, as an individual or as a liquidator, is a matter into which defendant has no interest to inquire: The same is applicable to the claim of Ramsey, who was a member of the partnership and who authorized plaintiff to settle and liquidate its affairs. Defendant has no interest in asserting the rights of Ramsey. It is sufficient if payment to plaintiff will protect defendant from a subsequent demand for the same debt by Ramsey, and of this there can be no doubt.

W. L. Spears, Liquidator, v. Mrs. J. Spears, Administratrix, 642.

6. No answer having been filed by the defendants, no judgment by default having been entered against them, it follows that there was no issue joined when final judgment was rendered. Without issue joined the court was incompetent to pronounce judgment. The fact that one of the defendants did not answer interrogatories within the legal delays, does not join issue with plaintiffs' demand.

G. Henshaw & Sons v. D. Flannery & Co., 671.

SEE PRESCRIPTION, No. 5—*Henry Bidwell v. O. Oavaroc and Bank of Orleans*, 307.

SEE EVIDENCE, No. 24—*Spears, Tutor, v. Mrs. Spears, Administratrix*, 537; AND No. 27—*Davis v. Madden*, 632.

SEE MORTGAGE, No. 12—*Heard v. Patton*, 542.

SEE DAMAGES, No. 11—*McCubbin v. Hastings*, 713.

PLEDGE.

1. The note sued upon having been given subsequently to the date of a written contract and identified therewith in its own terms, it was proper to permit parol evidence to show the settlement or agreement under which it was given. The plaintiffs are not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of a change in the sum first agreed on, and is binding on defendant in the absence of error or fraud.

PLEDGE—Continued.

The defendant being the agent of the intervenors and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery delivered to them, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained. The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any. The principle which sustains the pledge as collateral, which is placed in the hands of a broker to sell, must apply here.

J. Davidson & Hill v. Thomas B. Bodley, Norwalk Iron Works, Intervenor, 149.

2. This is a suit brought against defendant on a note drawn by him, and pledged as security to plaintiff by Carlos, Marks & Co. for the payment of three of their notes. The defense is that the defendant has paid two of the notes, and has tendered the plaintiff the amount of the last one, for which the instrument sued on was given in pledge, it being a note signed for accommodation and without consideration, for the benefit of the pledgers.

The plaintiff knew that the pledge was an accommodation note. In law and equity, therefore, the defendant ought not to be required to pay more than the amount for which the pledge was given, to wit: the three notes discounted by Carlos, Marks & Co., and ought not to be extended to cover money overdrawn by said Carlos, Marks & Co. But a formal real tender of the money having not been made as required by law, defendant can not be exonerated from interest and costs.

Mechanics' and Traders' Bank v. J. Barnett, 177.

3. In this instance, under the contract of pledge, the plaintiff had special authority to sell the collaterals at public or private sale at its option.

Article 3165 of the Revised Code was amended on the twenty-third of February, 1872, so as to make it lawful for the pledger to authorize the sale or other disposition of the property pledged, in such manner as may be agreed on by the parties, without the intervention of courts of justice. According to the judicial admissions of the defendant, it appears that the pledge was taken after the amendment of article 3165.

Louisiana Savings Bank and Safe Deposit Company v. Cyrus Bussey, 472.

SEE BILLS AND PROMISSORY NOTES, No. 14—*Gardner v. Maxwell*, 561.

SEE MORTGAGE, No. 15—*Mechanics' and Traders' Bank v. Powell*, 647.

POLICE JURIES.

1. As the police jury of East Baton Rouge has laid out a public road on the land of the plaintiff without allowing the jury of freeholders to assess such damages as he may sustain thereby, it has acted in violation of the law, and the plaintiff has the right to appeal to the court for an injunction restraining the police jury from illegally divesting him of his property.

N. K. Knox v. Police Jury of East Baton Rouge, 204.

2. There is no proof in the record that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury.

If the warrants or certificates were authorized to be issued, they are not sufficient to justify the judgment of the court below. Police juries, in the administration of the limited powers confided to them, must provide means by taxation for the purpose and in the manner provided by law. They can not bind the parishes by putting in circulation their notes or warrants at pleasure.

Flagg v. The Parish of St. Charles, 319.

POSSESSION IN GOOD FAITH.

1. The defendant being a possessor in good faith owes rent only from the institution of this suit, and is entitled to his claim for the value of the improvements against the owner of the property from the time he made them, with legal interest.

Louis Dufilho v. Henry Mayer, 398.

2. This is a petitory action against the defendant for certain lands. The only question is that of prescription. It is well settled that, to become the basis of prescription, the title must be apparently good, and of a kind calculated to induce a belief in the purchaser that it is perfect. A title defective in form can not be a basis of prescription. By this the law means a title on the face of which some defect appears, and not one that may prove defective by circumstances, or evidence *de hors* the instrument.

A possessor in good faith is one who has just reason to believe himself master of the thing he possesses, although he may not be in fact. In this instance, it is a question of fact, and there is nothing in the record to show that the defendant had any reason to doubt that his title was good, until the institution of this suit. Hence prescription lies in his favor.

Hall & Turner, Agents, etc. v. Timothy Mooring, 596.

PRACTICE.

1. The answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss.

Rhoda E. White v. Myra Clarke Gaines, 75.

PRACTICE—Continued.

2. Cire, the subrogee of Powhatan Wooldridge to a judgment obtained by the same v. E. Montause—which judgment was transferred from P. Wooldridge to E. Wooldridge, and by E. Wooldridge to Cire, caused a *fi. fa.* to issue in said judgment. Hedrick, the intervenor, took a rule against him to quash the writ, on the ground that he, the intervenor, was the real owner of the judgment seized in the suit of Hedrick v. E. Wooldridge, and purchased by him at sheriff's sale. Hedrick had proceeded by attachment against E. Wooldridge, absentee. In this attachment case several citations were made, but it seems that in every instance the returns of the sheriff were simply that service of petition and citation was made on the curator *ad hoc* in person, mentioning the name of the curator. It appears from the returns of the sheriff, that in neither of the instances were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. A court can presume nothing with regard to a party being cited.

The failure to serve the proper citation is fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. Therefore the rule was properly discharged.

Subsequently to a decision of the lower court, that the order granted for a suspensive appeal on the part of the intervenor, plaintiff in the rule, did not suspend execution on the *fi. fa.*, said intervenor filed a petition of third opposition and prayed for an injunction, which was issued. To this proceeding an exception was filed, on the allegation that the grounds of action of the rule and of the petition for injunction were the same, and that the pendency of appeal on the rule supported the plea of *lis pendens* which was presented. This exception was properly maintained by the judge *a quo*.

Powhatan Wooldridge, Joseph A. Cire, Subrogated v. E. Montause, M. S. Hedrick, Intervenor, 79.

3. The demand in this case being in the alternative, there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the part-

PRACTICE—Continued.

nership assets, or alleged to be a part thereof, when, in truth, they were not so alleged to be.

Thomas E. M. Smith v. Patrick Donnelly, 98.

4. Where final judgment was rendered in favor of the two members of the defendant firm who were before the court, and the appeal was taken as to one only;

Held—That both defendants having an interest in maintaining the judgment, should both have been made parties. The motion to dismiss the appeal must prevail.

Lucy Hammitt and Husband v. Payne, Huntington & Co., 100.

5. An inspection of the record in this case shows that there is no note of the evidence, and it appears that there was in fact no evidence introduced to sustain the various items in the executor's account, amounting to \$678 50, grouped in said account, as "amount of privileged claims paid." Under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. The ends of justice require that this case should be remanded.

Succession of Celestine Dorville—in the Matter of the Executor's Account, 131.

6. The third opponents in this case attempt to regulate the effect of a seizure by a creditor with special mortgage and vendor's privilege, in what relates to them or their junior mortgage, eighteen months after the seizure had been released, the sale consummated, and the funds distributed. This is an extraordinary proceeding. There is no longer any ground for a third opposition to stand upon. The exception that there is no cause of action is well taken.

Payne, Dameron & Co. v. Eaton & Barstow—E. J. Gay & Co., Third Opponents, 160.

7. The respondent refuses to grant the relators a suspensive appeal on the ground that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor or against them from which they could appeal. In this there was error on the part of the judge *a quo*. If the relators were not parties to the suit, it was because the judge erroneously refused to allow them to intervene. But third parties may intervene when they allege, as they do in this case, that they have been aggrieved by the judgment.

State ex rel. Mrs. Pecot et al. v. Parish Judge of the Parish of St. Mary, 184.

8. The certificate of the clerk of the court *a qua* as to all the matters in regard to plaintiff, defendant, and the intervenors who have appealed, is sufficiently full. The proceedings as to the intervenor

PRACTICE—Continued.

Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect the parties.

The record shows that the citations on the intervenors were served, but before the specified delay expired, and before issue was formed thereon either by default or otherwise, the plaintiff caused the default taken by her against the defendant to be confirmed and the intervention dismissed. This was irregular and premature. Issue should have been joined.

- *Mrs. S. O. Lane v. Joshua G. Clarke. Heirs of Lane et als., Intervenor*, 201.
- 9. Section 1067 of the Revised Statutes does not repeal article 338 of the Code of Practice in regard to the recusation of judges.
State ex rel. O. Provosty, District Attorney, v. Judge of the Seventh Judicial District Court, 225.
- 10. Where the court, opening at ten o'clock, the defendant's counsel came into court at twenty minutes past ten and found his case had been submitted, the judge *a quo* did not err in refusing to reinstate it. The testimony shows that the case was not taken up out of its regular order, and defendant's counsel gave no good reason why he was not present. If he chose to take the risk of his case not being reached during his absence, he must take the result of his risk. *John Anderson v. J. I. Arnette and Wheless & Pratt*, 237.
- 11. Compensation allowed to experts, auditors and judicial arbitrators is, by article 552 Code of Practice, to be paid, as well as the taxed costs, by the party cast; and this implies a delay of payment until the termination of the suit.
James L. Lobdell v. Bushnell and Others, 394.
- 12. The proceeding by rule to annul the judgments complained of was irregular and inadmissible.
Widow E. Lefranc, ex parte, on Rule to have Inscriptions of Taxes and Judgments for the same erased, 666.
- 13. Where a final judgment has never been revised in the manner provided by the Code of Practice, it can not be practically reopened and reviewed, on a proceeding by rule, by the same court which rendered it, four months after it became final and while the *fieri facias* was in the hands of the sheriff.
City of New Orleans v. Mechanics' and Traders' Bank, 668.
SEE PLEADINGS, No. 3—*Bussey & Co. v. Rothschild*, 316.
SEE GARNISHMENT AND GARNISHEES, No. 5—*Hennen et als. v. Forget, Guillet et al.*, 381.
SEE SURETY, No. 12—*Whan v. Irwin et al.*, 706.
SEE DAMAGES, No. 11—*McCubbin v. Hastings*, 713.

PRESCRIPTION.

1. A suit instituted in a court without jurisdiction interrupts prescription. *Henry J. Sorrell v. Victor Laurent*, 70.
2. This suit is brought against the sureties of a late sheriff to recover the amount of a judgment rendered against him. The main defense is the prescription of two years, pleaded under section 3546 of the Revised Statutes.

It is true that the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, the sheriff, was, and this interrupted prescription as to them. Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal.

Cohen & Wilson v. William Golding and Francois Lacroix, 77.

3. The defense to the plaintiff's claim is the prescription of three and ten years. The relation of the parties was that of agent and principal, and the right of the planter to sue his factor for an account is only prescribed by ten years. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying, as to an open account.

J. E. Prudhomme v. O. B. Plauché et als., 133.

4. The judgment having been rendered by default and no notice of judgment having been given when the appeal was taken, it was therefore in time.

The bond of appeal was given for the amount fixed to cover costs and in favor of the person who is clerk. This is sufficient.

The plea of prescription having been filed in this court and the appellee having asked that the case be remanded to show an interruption of prescription, under the law this must be done.

Charles Hoffman v. J. O. Howell and I. F. Riley, 304.

5. In this suit for damages for slander of title, Cavaroc filed a general denial; the bank, for answer, asserted title in itself, and by this answer the bank changed the suit into a petitory action in which it became plaintiff. Therefore it must succeed or fail on the strength of its own title. To this answer plaintiff pleaded the prescription of ten and thirty years.

The bank has failed to prove a valid title in its favor. But if the bank had shown that it had acquired a valid title at the marshal's sale, on which it relies, the plaintiff has acquired a valid title since then by prescription.

The plaintiff held possession since June, 1859, under titles translatif of property and apparently good, till the institution of this suit in July, 1870. More than ten years had elapsed from the com-

PRESCRIPTION—Continued.

mencement of possession, and there is nothing in the record to show that it was not in good faith. Therefore the plea of prescription must be maintained.

Henry Bidwell v. O. Cavaroc and the Bank of New Orleans, 307.

6. All actions against the city of New Orleans, for work or labor done, either under a contract or for damages, or extra work, are prescribed unless commenced in one year from the time such work is required to be performed, or such damages are alleged to have arisen.

John Wolf v. The City of New Orleans, 309.

7. The pleas of want of citation and prescription are inconsistent. Pleading prescription is an appearance.

Nicholson & Co. v. Mrs. A. M. Jennings, 432.

SEE JUDGMENT, No. 1—*Samory v. Montgomery*, 50; AND No. 6—*Alter v. McCullen*, 251.

SEE POSSESSION IN GOOD FAITH, No. 2—*Hall & Turner v. Moor-ing*, 596.

SEE SALES, No. 23—*Duckworth v. Vaughan et al.*, 599.

SEE EVIDENCE, No. 28—*Goodman v. Rayburn*, 639.

PRIVILEGE.

1. Judgment having been rendered in favor of John Coleman & Co., with privilege on a certain piece of property on Rampart street, New Orleans, which privilege was for having paved the street in front thereof, said property was sold by the sheriff and bought by John Coleman. It had been previously mortgaged to the plaintiff for a sum in excess of the amount realized at the sale. Mrs. Dunning, the plaintiff, issued executory process, and the sheriff declined to sell the property under her mortgage, as he had already sold it under Coleman's privilege. Mrs. Dunning now sues John Coleman & Co., to have the sale rescinded and her mortgage declared to have priority over Coleman's privilege.

Article 684 of the Code of Practice and article 3274 of the Civil Code of 1825, which has not been repealed or changed by any special legislation, govern this case. The act of 1840, on which the defendants rely, even if that act were admitted to be in force now—a point on which no opinion is expressed—gives them the privilege claimed, but on certain conditions. When they were complied with, it was too late to have any effect on the plaintiff's mortgage. The Statute of 1840 does not, in any manner, repeal or change the article of the Code above quoted, in regard to the time when the privilege shall be recorded. It simply fixes the length of time which the privilege is to endure. As the privilege under which the sale took place was not superior to the plaintiff's mortgage, and as the price bid was not sufficient to pay her mortgage, it fol-

PRIVILEGE—Continued.

lows, under the article of the Code of Practice above cited, that there was no legal adjudication, and therefore that there was no sale.

The court *a qua* did not err in nonsuiting plaintiff as to the claim she made against Coleman, to cause him to make restitution of the rents received by him since the sale, to be placed to the credit of her debtor. The plaintiff would have had no authority for making these rents responsible for her debt, if the property had remained in the hands of her debtor.

Her rights rested on the realty and not on its revenues.

♦ *Mrs. O. K. Dunning v. John Coleman & Co.*, 47.

2. The effects of a third person equally with those of the lessee are, by article 2707 of the Civil Code, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy it would seem that the privilege would continue to attach like those of the lessee, and on the same conditions, for fifteen days after removal. But by the well established rule that privileges are *stricti juris*, this court is precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons only on the conditions imposed in article 2707 of the Code, and to those conditions it is thought that the privilege must be restricted.

*E. T. Merrick, Race & Foster v. Emile La Hache—St. Louis Piano Manufacturing Company, Intervenor*s, 87.

3. Where a patent, transferred for full paid in stock to a company, was subsequently seized and sold by the creditors of said company and bought by the original proprietor of said patent, who paid the amount of the sale into the sheriff's hands, and claimed the same by virtue of his vendor's alleged privilege, as third opponent;
Held—That the clause in the charter that the full paid stock should not be issued until the *ordinary* stock should be taken, and its non issuance in consequence thereof, did not make the third opponent any the less the owner of his shares. Considering his transaction with the company as a sale, he received the price, and hence has no vendor's privilege, nor would he have any if considered as an exchange.

Daniel and James D. Edwards v. The Bringier Sugar Extracting Company—Third Opposition of M. S. Bringier, 118.

4. The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and

PRIVILEGE—Continued.

void. It is true, the right of the plaintiff to make and vend gas will begin on the first of April, 1875, but the right to sell shares of its capital stock, to the amount of three millions of dollars and the duty to erect works, buildings, machines, lay gas pipes, and prepare everything necessary to begin the enterprise or business, vested the moment the corporation began.

A void title set up to defeat the plaintiff's right to prepare for their business, invades their charter as effectually as if set up to obstruct the business after it had begun.

This is not an action of damages under article 2315 of the Revised Code. The plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, art. 21. The exception to the petition of plaintiffs on the ground that it discloses no ground of action can not be maintained.

Crescent City Gaslight Company v. New Orleans Gaslight Company,
138.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first of April, 1875, is no more disclosed in the title of the act, entitled "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending gas is indicated therein. The prolonging of defendant's corporation for twenty years virtually gives a new charter for that period. Moreover, the title is deceptive and calculated to mislead the mind from the true object of the statute. Hence, the statute is repugnant to article 115 of the constitution of 1852 then in force, and is therefore void.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895, and the act of March 1, 1860, which had that object in view, being unconstitutional, was utterly void from the beginning.

The act incorporating the plaintiff's company, conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years from the first of April, 1875, is not repugnant to article 114 of the constitution of 1868, then in force, requiring the object or objects of every law to be embraced in the title. The object of the act as stated in the title was "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges. These powers and privileges need not be detailed. The title of the act disclosed the creation of a gaslight company. This was sufficient to cover the monopoly or exclusive privilege to make and vend gas.

Ibid, 138.

PRIVILEGE—Continued.

An exclusive privilege or monopoly can be granted under the usual title to incorporate a company. The grant of the monopoly complained of in this case does not violate the constitution, and is valid.

The State intervening, not to set up some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing the intervention.

In regard to the intervention of the city of New Orleans, the right reserved by the State for it to become the purchaser of the gas works, fixtures, etc., at the expiration of the charter of the defendant was not such a vested right that the State could not withdraw or recall without contravening that provision of the constitution of the United States prohibiting a State from impairing the obligations of a contract.

Even conceding that the authority given to the city if she saw fit at the expiration of the defendant's charter to purchase the gas works by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived; and the grant of the right and exclusive privilege to plaintiff to make and vend gas is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. This grant by implication revokes or recalls any previous authority given the city to buy the gas works of defendant on the first of April 1875. This is violating no contract protected by the constitution of the United States. The intervention of the city can not be maintained. *Ibid*, 138.

5. One must be sued before the judge having jurisdiction of the place of one's domicile, except in the cases provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases.

A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding the parties, and consent can not give jurisdiction.

Edward J. Gay & Co. v. Eaton & Barstow, 166.

6. The furnishers of supplies or cash actually used for the cultivation

PRIVILEGE—Continued.

of a plantation have a privilege on the crops of that year, and it can not be divested by any prior mortgage, whether legal, conventional, or judicial, or by any seizure and sale of the land while such crops are on it, and such privilege bears on the growing crop.

As against the Citizens' Bank holding a conventional mortgage recorded in January, 1868, E. J. Gay & Co. have no preference for the supplies they furnished the defendant from January till April 23, 1873, because their claim was not recorded on the day the contract was entered into. Privileges are *stricti juris*, and persons desiring to affect third parties therewith must register them in the manner required by law.

Construing articles 3273 and 3274, Revised Code, so as to give effect to both, the conclusion is that privileges have effect as to third persons generally from the date of their registry; but for a privilege to have a preference over an existing mortgage it must be recorded on the day the contract out of which it arises was entered into.

Bank of America v. Fortier, 243.

7. There are several reasons why the privileges of the overseer and laborers set up by the third opponents as subrogees have no preference over the prior mortgage claim of the plaintiff, the most important being that said privileges were not recorded in the parish where the property is situated on the day the contracts out of which they arose were entered into.

Harriett G. Adams v. Edward W. Adams. John Chaffee, Bro. & Son, Third Opponents, 275.

8. The suggestion to dismiss this appeal is made under the statute No. 25, acts of 1874, but is not in reality supported by any one of its provisions. An appeal can not be dismissed upon a mere suggestion in argument after the case has been taken up on its merits, without any reservation of the right to move to dismiss.

This court does not see how it is possible to recognize a privilege in favor of laborers on mules, agricultural implements, etc., sold in 1873 for work done by them on a plantation in 1872.

Succession of G. S. Dufossat et al. v. B. S. Labranche et al.—Opposition of B. Brown et als., laborers, 283.

9. When the city of New Orleans purchases a piece of property and gives its bonds therefor, the bonds must be considered as a payment of the price, and the property thus acquired, unless the contrary be expressly stipulated, is free of all incumbrance, such as vender's lien and privilege.

As the vender's privilege need not be stipulated in the act of sale, but results from the nature of the debt, so it need not be expressly

PRIVILEGE—Continued.

renounced, but may be implied from the terms of the instrument. This implication must, however, be clear.

Sam Smith & Co. v. The City of New Orleans and Recorder of Mortgages, 286.

10. There is a wide difference between the bonds issued in the name of and payable by an important political corporation and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

Where, as in the contract of sale relied on in this instance, payment was made in bonds, it was as if the price had been paid in current money. The language of the contract and of the act itself, on which it is based, implies such an intention, and indicates that it was meant to give a full discharge of the debt, without the reservation of any lien or privilege to secure the bonds at maturity

Sam Smith & Co. v. The City of New Orleans and Recorder of Mortgages, 286.

11. Privileges have effect from the date on which the act or other evidence of the debt is recorded in the parish where the property affected is situated. But to have effect against those who have acquired, not who may acquire a mortgage, it must be recorded on the day it was entered into. The limitation relates only to the effect as to mortgages existing at the date of the privilege contract, and requires that such contract shall be recorded on the day of its execution in order to have a preference over mortgages then duly inscribed.

E. J. Gay & Co. v. E. D. Bovard—J. A. Holmes, Third Opponent, 290.

12. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferrer, the payee thereof, was a citizen of this State and had no such right.

Where the property of one against whom judgment had been rendered appears to be subject to privileges or mortgages entitled to preference over the judgment creditor, the latter may, by a rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privileges or mortgages to show cause why they should not be erased; and the

PRIVILEGE—Continued.

seizing creditor can not be required to resort to a direct action against persons holding such mortgages and privileges.

When the prescription that had already acquired on the mortgage note held by De Boigne was renounced, the plaintiffs were judicial mortgage creditors. The waiver renewed the debt for the person making said waiver, but it did not revive the mortgage as to plaintiffs or to their prejudice.

New Orleans Canal and Banking Company v. The Recorder of Mortgages of the Parish of Pointe Coupee et als., 291.

13. The evidence establishes the lease for the time claimed, but the court erred in granting a privilege, as it is shown that the furniture was moved from the premises two or three months before this suit was brought. *Mrs. A. Langsdorf v. LeGardeur*, 363.

14. Plaintiffs, in this instance, rely on a judgment in their favor, which, however, did not grant them a privilege on a certain property belonging to Stinson, although claimed in that suit. They rested satisfied with the judgment and had it recorded. The consequence of their acquiescence in that judgment is the loss of their privilege so far as third parties are concerned. But even if that judgment did not settle the claim of plaintiffs adversely to them, they have lost their privilege by failing to reinscribe it within ten years. The privilege was recorded in 1860; the judgment was recorded in 1861, and there had been no reinscription thereof in 1872, when defendants foreclosed their mortgage.

Nicolson & Co. v. Citizens' Bank, 369.

15. The plaintiff had no privilege on the boat, as he claims, because the \$500 advanced by him were to cover the expenses which he undertook to defray. The sequestration was therefore wrongfully issued.

L. A. Welton v. E. P. Burton, Captain, and the Owners of Steamboat Ruth, 448.

16. In this instance the contract for repairs and improvements was entered into on the seventeenth of June and was not recorded until the nineteenth of said month. By the law, the privilege of the contractor in such a case does not have preference over creditors whose mortgages then had force.

Citizens' Bank of Louisiana v. St. Louis Hotel Association and J. Cockrem, Receiver and Third Opponent, 460.

17. The delay to record an act of sale can not defeat the vendor's privilege and mortgage in favor of a creditor of the vendee who held a legal or judicial mortgage against him, if the mortgage and privilege were recorded at the same time with the act of sale.

Aimee Joumonville, Wife of E. Vives v. A Jackson Sharp, 461.

PRIVILEGE—Continued.

18. The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor, and those to secure the payment of expenses incurred in selling the property.

Succession of George W. Rawls—Opposition to Tableau of Debts, 560.

SEE LESSORS AND LESSEES, No. 4—*Case v. Kloppenburgh*, 482.

SEE SUCCESSION, No. 8—*Succession of Haggerty*, 667.

PRIVY.

1. The privy, in this instance, being built upon the yard or space of ground belonging in common between the parties, the defendant had no right to place or keep said privy on it without the consent of his co-owner. *Martin Kenopsky v. Mark Davis et al.*, 174.

PROTEST AND NOTICE.

1. Article 313 of the Revised Code and article 964 of the Code of Practice do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the curator, who was not appointed as such until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that, ten days before service of notice of protest, the heirs of the indorser of the note sued upon, had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to the indorser to his son-in-law at the residence of said indorser.

At the time of the protest, no legal representative having been appointed for the indorser, the notice addressed to him and left at his domicile on the day of protest was sufficient to fix his liability. The plaintiff, through the notary, had exercised reasonable diligence and given such notice of protest as under the existing state of facts the law required to be given.

Mrs. Estelle Rosa Weaver v. D. B. Penn and Alfred Penn, 129.

SEE BILLS AND PROMISSORY NOTES, No. 15—*Rayne v. Ditto*, 622;
AND NO. 17—*McNabb v. Tally & Duncan*, 640.

PROMISSORY NOTES.

SEE BILLS AND PROMISSORY NOTES.

PROCESS OF LAW.

SEE OFFICES AND OFFICERS, No. 8—*Fitzpatrick v. City of New Orleans*, 457.

PUBLIC SERVITUDE.

1. The joint resolution of the Legislature upon which defendant relies in this case, and the title of which is: "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Com-

PUBLIC SERVITUDE—Continued.

pany, a corporation of the State of Alabama," sufficiently discloses the object of the resolution. It is not therefore unconstitutional. The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. The right of that body to grant the privilege to corporations or individuals to make and maintain wharves has long been settled. In this instance the State granted the right to the riparian owner. This is permissible. The grant was not a donation of public revenues to a private purpose. It was the control by the Legislature of a public servitude.

The City of New Orleans v. New Orleans, Mobile and Chattanooga Railroad Company, 414.

REMITTITUR.

SEE INJUNCTION, NO. 1—*John T. Michel v. Zerilla Meyer et al.* 173.

RES JUDICATA.

1. What was never of record can not be supplied by parole. The ruling of a court upon the exclusion of evidence must be of record. The plea of *res judicata* does not rest on the regularity of the proceedings, which can be removed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties.

Mrs. Isabella A. Fluker v. Mrs. Harriet Herbert. Mrs. Barkdull called in warranty, 284.

2. The plea of *res judicata* can not prevail, as there was a judgment of nonsuit as to the portion of the claim embraced in this action.

Mrs. A. Langsdorf v. S. LeGardeur, 363.

SEE SURETY, NO. 7—*Kimbrough v. Walker et als.*, 566.

SEE EXECUTOR, NO. 2—*Wells v. Annie Alexander and Husband*, 624.

SALES.

1. In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular. *Dockham v. Potter*, 73.
2. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed; Held—that the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or of that of the court if the husband refused his assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs could set up proceedings to annul.

SALES—Continued.

The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt.

A purchaser at sheriff's sale can not maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure.

An adjudication under an illegal or insufficient seizure conveys no title.

In this case, the whole proceeding purporting to be *in rem* was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in actual possession thereof. The special law establishing certain formalities to be observed in judicial proceedings in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, does not apply to a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages. *Dennis Cronan v. Edward Cochran et als*, 120.

3. In this suit, instituted by plaintiff to recover his share in the succession of his grandfather and grandmother, the only question being whether the Second District Court, parish of Orleans, had jurisdiction to issue the order of sale to operate said partition;

Held—That the court *a qua* did not err, under the state of facts existing in the case, and by virtue of article 924 of the Code of Practice, in maintaining its jurisdiction. Having jurisdiction it could order the sale of the property to be partitioned, and it follows that the liens and mortgages on the property sold were shifted to the proceeds. The opponent, Sickerman, retains his right to participate in said proceeds to the extent of his mortgage. The purchasers of said property could not be compelled to pay the price before they were tendered an unencumbered title, and al that they required was the erasure of the mortgages on the property sold. *Charles Diamond v. Robert E. Diamond et als*, 125.

4. This is a suit to force compliance with the terms of adjudication of property. The defense is want of title in the seller, the administrator of the Trainor estate. Trainor bought the lot about which the dispute is as to title, at a tax sale made in August, 1860, at the suit of the city of New Orleans, for city taxes. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The provisions of these acts not having been complied with in the tax sale, it fol-

SALES—Continued.

lows that the evidence does not establish a valid title in the succession of Trainor.

Successions of John and Mary Trainor, 150.

5. As Charles M. Conrad was an offender of a class mentioned in the act of Congress of the seventeenth of July, 1862, entitled an act to suppress insurrection, etc., this statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. By the decree of condemnation of the third of February, 1865, only such right or title as the offender had, passed to and vested in the United States, and this was the title conveyed to plaintiff by the Marshal's sale on the twenty-ninth of March, 1865. But Conrad, at that time, had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself, although the act was registered only in 1870 in the parish of Orleans, where the property is situated. Hence the United States acquired no title and could not convey any to plaintiff.

In regard to the property confiscated, the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale, who is induced to buy the property standing on the public records in the name of the defendant in execution.

The failure of defendants to record their title in the parish of Orleans, as required by the registry laws of the State subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was nevertheless in them from the time of the sale, and neither their vender nor his heirs could recover it from them.

As to the United States it was immaterial whether defendants had recorded their title or not; the property in question belonged to them and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Charles M. Conrad for offenses committed by him. The defendants were not parties to these proceedings and their title to the property could not be divested by the decree of condemnation.

E. W. Burbank v. O. A. & L. L. Conrad, 152.

6. The only objection urged by plaintiff to the sale in this case is that the price was paid in Confederate money.

There are three grounds fatal to the objection:

First—The contract by which the defendant acquired the property

SALES—Continued.

in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868.

Second—The plaintiff, by receiving \$350 of the proceeds in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—The plaintiff can not keep the price or any part thereof, and claim the thing sold. *Sarah S. Tilsen v. Catherine Haine*, 228.

7. Where the property of the succession was offered for sale for cash, and, no one bidding, it was immediately offered on the terms of credit designated in the order, and was adjudicated to the administrator thereof, who directed the sheriff to adjudicate it to one Mrs. Simmons, a person having no real intention of purchasing, but receiving the adjudication only as an act of friendship to the administrator;

Held—That the succession never was divested of the property.

Ambrose et al. v. Madison Marsh, 241.

8. The question in this case is whether an act of sale was simulated. The judge *a quo* held it to be a simulation, because the plaintiff in injunction moved to strike out interrogatories on facts and articles propounded to him, on the ground that they tended to make him confess himself guilty of a crime in seeking to make him contradict his affidavit annexed to his petition for injunction, which motion was withdrawn by permission of the court. The fact of filing such an injunction can not be considered as producing the effect given to it by the court below. It is not an admission of simulation, but must be presumed to be the interpretation which plaintiff's counsel gave of the tendency of such interrogatories. When put on the stand to answer said interrogatories, the plaintiff asserted the reality and good faith of his purchase, his ability to pay the price, and the actual payment thereof. The testimony in favor of the reality of the sale is not overcome.

Oliva Theriot v. G. Lyons, Sheriff, et al., 253.

9. It matters not what informalities affect the sale from Mrs. Pope, one of the defendants, to the intervenor. As the plaintiff is not a creditor of the seller, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given to the intervenor.

Joseph Moore v. Mrs. Sallie Pope and Husband—Willis J. Pope, Intervenor, 254.

10. An actual corporeal possession of property seized must take place in order to make a sheriff's seizure valid, and to render a compliance with the law complete. The sheriff must have the property in his own possession and under his own control, or in the posses-

SALES—Continued.

sion and under the control of some person duly appointed and authorized by him.

Mrs. Mary O. Gordon v. Patrick Gilfoil—J. H. Gilfoil Intervening, 265.

11. As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer that they know not the signature, but, on the contrary, aver that it is an act under private signature void for simulation, or null as a disguised donation for informalities, the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses, and the preliminary evidence on which the deed had been admitted to registry.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff, and parole evidence in support of said charge was properly rejected.

As the ancestor of defendants could, however, have shown the simulation of the sale by a counter letter or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for confessed, and they establish the simulation of the sale beyond doubt.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 266.

12. While there are facts in the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and the son as to the creditors of the former, yet the sale of the property in question from the former to the latter can not be treated as a pure simulation. The sale may have been resorted to for the purpose alleged by plaintiff, but, whether for fraudulent purposes or otherwise, could only have been successfully assailed by a revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

Currie, King & Co. v. J. O. Pierce et als. Scott & Brother v. The Same. (Consolidated.) 268.

13. It appears from the mortgage certificate that the judgment of Dudossat, defendant in injunction, creates a judicial mortgage prior in rank to the judicial mortgage of plaintiff in injunction. The preference that Soulié acquired from a prior seizure of Ranson's property can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor. When sold, the property was adjudicated

SALES—Continued.

to Soulié, who refused to pay over the money to the sheriff, whereupon the sheriff was proceeding to resell the property when enjoined by Soulié on the ground that he had the right to retain the money in satisfaction of his judgment. This was wrong; Soulié should have complied with his bid; a *concurso* was his remedy. The sheriff was right when proceeding to resell, and the injunction was wrongfully taken.

Lehman, Newgass & Co., A. Dudossat subrogated v. Louis Ranson. On injunction of Bernard Soulié, 279.

14. There is no law which requires the sheriff of a country parish to announce at a sale under a writ of *feri facias* the amount of taxes due on the property offered. The doing was mere surplusage on his part, and as it invaded no one's rights, it could cause no injury. The fact that the bond of the adjudicatee was not given within three days after the adjudication is no ground to annul the sale in a suit instituted by the codebtors of the defendant.

That the judgment debtors, plaintiffs in this suit, have never had an offer of delivery of the surplus money or twelve months' bond for over \$530, coming to them under the adjudication made to them, is no ground to set aside the sale. It might be a ground for them to pursue the sheriff to a fulfillment of his duty.

That the act of sale allowed to a judgment creditor more than was coming to him, at the expense of the judgment debtors, is no reason for annulling the sale. The excess is something over ten dollars. This trifling error could have been corrected in the court below.

That the act of sale and return of the sheriff say nothing about interest is no reason why the sale should be annulled.

That the sheriff did not, within ten days at furthest from the adjudication, deliver or direct to the clerk of the court the original of the act of sale, the delivery having been made fourteen days after the adjudication, is no ground to annul the sale.

A. L. Gusman et als. v. Gustave LeBlanc, Sheriff, et als., 280.

15. Admitting that the New Orleans Mutual Insurance Association had no right to purchase the property in controversy from Fairbanks & Gilman, it does not make said property liable to Fairbanks & Gilman's creditors in payment of their debts. If the company did any thing contrary to law, the result might be the failure of its charter, but this court does not understand the law to be that if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized by his creditors to pay his debts.

SALES—Continued.

The sale of the machinery (the property in question) was a valid sale. Fairbanks & Gilman remained in possession it is true, but they held by a precarious title, to wit, a lease from the purchasers, and could have been divested of possession at any time, if the conditions of the lease had not been complied with.

The machinery thus sold to the New Orleans Mutual Insurance Company was paid for by Fairbanks & Gilman either at the time the sale was made or before this suit was instituted. This would, of course, destroy whatever privilege the Edwards, plaintiffs, had as vendors. But all the machinery and materials which were not mentioned in the act of sale to the said insurance company and all the machinery and materials put into the building by D. & J. D. Edwards since that sale are liable to their execution. Whether or not the company have the landlord's lien on these effects can not now be settled. If they have, when the property is sold, they can exercise it.

The intervention of Cavaroc & Son must be maintained as to the sugar and molasses seized. These articles had been furnished to be refined for a compensation to Fairbanks & Gilman of two-thirds of the profits Cavaroc & Son might make. These relations between Cavaroc & Son and Fairbanks & Gilman were not those of partners, each liable for the acts of the other. No part of the property seized ever belonged to Fairbanks & Gilman. What they were to receive from Cavaroc & Son was, in reality, only a stipulated price for work which they agreed to perform. Whether Cavaroc & Son owed anything to Fairbanks & Gilman or not, on account of their transactions, is another matter. But this question can not be decided in the present controversy.

D. & J. D. Edwards v. Fairbanks & Gilman. Charles Cavaroc & Son v. D. & J. D. Edwards, 449.

16. Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void.
Succession of Ernest Porée, 463.
17. The plaintiff is himself a ship carpenter, and all the defects which he alleges to be in the schooner which he purchased at a public sale, if they existed, being apparent, he can not complain that the property he purchased was not what he had a right to expect it would be.

James H. Lynch v. Mrs. E. Kennedy and Husband, 464.

18. He who sells a credit or incorporeal right warrants its existence at the time of the transfer. The seller does not warrant the solvency

SALES—Continued.

of the debtor, unless he has agreed to do so. There is no lesion in such sales, and no relief can be granted.

Milton Benner v. Warner Van Norden et al., 473.

19. The false statement by defendant in the act of sale to the plaintiff of a certain piece of property, that said defendant, as universal legatee, had the capacity to purchase the property adjudicated to him at the succession sale of Polly Vassant, led the plaintiff into error in regard to the material part of the contract to his prejudice, and this assertion was an artifice whereby the defendant succeeded in effecting the sale, which therefore is void, because the pretended adjudication to defendant was an absolute nullity, and his sale of the property to plaintiff was the sale of a thing belonging to another.

The doctrine that the purchaser who has paid the price, and who has not been disturbed in his possession, can not demand the restitution of the price, is applicable only to a valid contract of sale. It has no application to a contract void for want of consent, and entered into in error produced by the fraud of the opposite party.

Formento v. Robert, 489.

20. This is a petitory action, based on untenable grounds. The sheriff, under whose sale the tract of land is claimed, never had possession of the property which he pretended to sell. He never seized it, except by giving notice of seizure. To constitute a valid seizure of a plantation, cultivated as such, the sheriff must take the property into his possession and custody.

D. O. Morgan v. E. M. Johnson, 539.

21. The plaintiffs sue to annul a probate sale on the ground of fraud and collusion between the administrator and the purchasers to sacrifice the property and evade the pursuit of the creditors of the succession.

The exception that a ratification of the sale by plaintiffs resulted from the filing by them of a third opposition, and claiming the proceeds, is well taken. The purchasers bought no doubt under what probably appeared to them regular proceedings and apparently in good faith. They should be protected.

The objection that the land was not divided into lots and sold in lots, as prescribed by law, is without much force. No survey was made, but the lots were sufficiently designated by means of the map of the official United States survey and sold in portions easily ascertainable. No such illegality thereby arose as to work nullity of the sale.

Walker & Vaught v. G. W. Kimbrough, Administrator, et al., 538.

22. In this petitory action plaintiff claims that her posthumous birth

SALES—Continued.

destroyed her father's will; that the executor became thereby incapable to act; and that the sale made by him, as such, conveyed no title to the purchaser, who subsequently transferred it to the defendant.

Prima facie, the title acquired by the first purchaser was a good one. The property had been sold under an order of a competent court, made at the instance of one apparently authorized to apply for it. Purchasers are not bound, at their peril, to inquire, when property is advertised for sale by an executor, whether any thing has occurred, outside of court, to destroy the will under which he is acting.

Besides, the succession of plaintiff's father being insolvent, and the property which she now claims having been applied, as was proper, to the payment of his debts, it is not seen how she has been injured by the sale of which she complains.

Robertine Green v. The Baptist Church of Shreveport, 563.

23. The plea, in this instance, that the lands were not surveyed and sold in lots as required by the constitution, can not be maintained. It is true that a survey of the lands was not made, but they were divided up into lots as required by law, and the lots were appraised separately; the lots were described according to the survey made by the government, and the sale was made in lots. This was sufficient.

The fact that the lands were sold under the last inventory ordered by the court instead of the first, is no ground for annulling the sale.

The order of the court having jurisdiction of the succession, which ordered the sale during the provisional administration of the public administrator, has not been appealed from, and is not an absolute nullity. Purchasers in good faith need not look beyond the order of sale made by a court having jurisdiction of the succession. They are not affected by antecedent irregularities. The jurisprudence on this point is settled.

The note sued upon is not prescribed. The name of the former administrator indorsed on it on the twenty-eighth of December, 1868, and the placing of this claim on the tableau, arrested the current of prescription, and it has not since acquired.

E. D. Duckworth v. W. H. Vaughan, Public Administrator, et al., 599.

24. This is a petitory action for a tract of land. The plaintiff bases her title on a patent in her favor, issued by the United States, for the lands in controversy. The defendant claims by location of an internal improvement warrant; the plaintiff by virtue of the act

SALES—Continued.

of 1851, giving *bona fide* purchasers from Maison Rouge a preference in purchasing from the United States. Each party displays a chain of title from Cox, holding under Maison Rouge, down to Copley. The tract of land was acquired by Brigham from Cox. He improved and cultivated it as a whole for several years before he sold it. It was then divided and owned by two different persons, and lastly Copley became owner of the whole tract as an entirety, in the same manner that Brigham owned it after the purchase from Cox. If Brigham had remained owner, there is no doubt he could have entered the entire tract at the minimum government price. If so, when the two divided halves of said tract were reunited in Copley as one owner, and the same status existed as when Brigham owned the entire tract, there can be no forcible reason why cultivation and improvement upon any portion of the entire tract, whether upon the upper or the lower half, at the time when division existed, did not carry with it the right to purchase the whole of it at government price.

Copley was owner of the entire tract in 1844, and cultivated upon it several years before 1849. This entitled him to the benefit of the provisions of the act of Congress, enacted in the interest of persons who purchased lands in the Maison Rouge grant under the title of Cox.

If frauds were perpetrated and malpractices resorted to by Copley in procuring transfers to himself, they were acts that took place seven years at least before the defendant's alleged purchase and settlement. These frauds, if they were frauds, did no injury to the defendant. If injury resulted to anybody, it was to the parties with whom he dealt; but thirty years have intervened, and it does not appear that either they or any of their heirs have ever complained.

Under the act of Congress of twenty-seventh January, 1851, all the lands within the limits of the Maison Rouge grant were reserved from sale, entry or location from the date of the act until three months after the public notice required to be given by the second section of the act. That notice was not given until the twenty-fifth of October, 1853. Hence, on the fifth of September, 1853, the defendant was debarred from making a location of her internal improvement warrant upon any land within the limits of the Maison Rouge grant; and subsequently, in December, 1854, and on the twenty-first of January, 1855, when she again applied to locate it, it was out of her power to locate it upon the lands in controversy, because before her last applications were made, those lands had been secured to plaintiff under pre-emption right in

SALES—Continued.

pursuance of the provisions made by law in favor of purchasers in good faith under the title of Cox, and who had improved and cultivated those lands. Therefore, defendant never acquired any title and plaintiff did.

M. A. Copley, Administratrix, v. Dorcas Dinkgrave, 601.

25. The question in this case is, whether the defendant had a right to dispose of a certain lot of cotton which he had sold to plaintiffs, and which plaintiffs failed to receive, to have weighed and to pay for, within a reasonable time and according to practice and the custom of trade prevailing in New Orleans, which allows only a delay of three to five days at the utmost for doing what is necessary to compel the execution of the contract.

It appearing, under the circumstances of the case, that the seller was sedulous, if not importunate, in his endeavors to close the sale, and that he extended to its utmost limits the period usual after a sale for receiving and paying, and it appearing also, on the other hand, that the buyers continued tardy and inactive until the sixth of January about receiving and paying for the cotton which they had purchased on the twenty-ninth of December preceding, and until defendant's patience, as he expresses it, "was at an end," it results that plaintiffs have no right to recover what they claim to be due to them by defendants.

Tabary & Amory v. T. F. Thieneman, 720.

SEE JUDGMENT, No. 7—*Livette v. Carrane*, 298.

SEE JURISDICTION, No. 12—*Succession of William Bobb*, 344.

SHERIFF'S FEES.

1. This is a suit against the defendant, a former sheriff of the parish of Orleans, to recover from him an aggregate amount of costs and sheriff's fees alleged to have been paid him above what he was entitled by law to collect from the city in criminal cases.

Under the provisions of the statute of 1857 the City Council could not go, in this matter, behind the certificates of judge and clerk. No material change has been made, on this point, under the provisions of section 1042, page 471, of the Digest of 1870. In the former case the treasurer was required to pay the sheriff's bills upon the certificate of the clerk and the presiding judge; in the latter case he is required to pay them after an account thereof shall be duly certified to be correct by the clerk of the court and the judge.

Taking the context of the two sections above mentioned, their purport is clearly the same, although the phraseology is different. But it is impossible to conclude from such a distinction, as contended for, that the city may, under the existing legislation, inquire into the legality of the sheriff's costs and fees when certified to as above stated.

City of New Orleans v. I. W. Patton, Sheriff, 168.

SHERIFF.

SEE SALES, No. 10—*Mary C. Gordon v. Patrick Gilfoil*, 265.

SEE SALES, No. 13—*Lehman, Newgass & Co. v. Dudossat*, 279.

SEE SALES, No. 14—*Guzman et als. v. Leblanc, Sheriff, et als.*, 280.

SEE JUDGMENT, No. 7—*Alex. Lirette v. John Carrane*, 298.

SEE SALES, No. 20—*Morgan v. Johnson*, 539.

STREETS AND BANQUETTES.

1. Where the defendant, being sued for the payment of a certain sum in consequence of the construction of banquettes in front of his property in Locust street, averred that the city of New Orleans had not complied with the formalities set forth in the city charter, in this—that one-fourth of the owners of real property fronting on said unbanquetted street did not petition for the banquetting alleged to have been done in that locality;

Held—That a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed in that street, being found in the record, it must be supposed, in the absence of rebutting evidence, on the principle of *omnia presumuntur rite esse acta* that the persons petitioning constitute one-fourth of the property owners on that street.

James J. O'Hara v. Henry Blood, 57.

2. It is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the council for that purpose. It is sufficient if it be done by those on the portion sought to be improved.

James Ready et als. v. City of New Orleans et al., 169.

SUCCESSION.

1. The land in controversy having been sold as the property of R. W. Graves, and his legal representative—the curator or administrator of his succession—having been cited to answer both the original and amended petitions claiming said land, and issue joined thereon as to him, the judgment for the land according to the corrected description was proper, but the judgment for the rent was erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of trespass of their mother, now deceased, as well as their father. They could only accept with benefit of inventory, and take the succession of their mother after its debts were paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.

Thomas H. Hunt v. Mrs. A. V. Graves, 195.

2. The assets shown as composing the separate succession of Mrs. Clark being her separate property, distinct from the assets of the succession of her husband, the opponent can not claim pay-

SUCCESSION—Continued.

ment out of these assets for his debt, which is a community debt due by the community estate.

Successions of George and Francis Clark—On opposition to the account of the executrix, 269.

3. Celestin LeBlanc, who gave a note in part payment of a plantation and slaves, due in February, 1862, to Jules LeBlanc, father of the minors in this instance, of whom said Celestin subsequently became the tutor, charges himself in his account with a large deduction on said note, on the ground that said note was given, in part, for the price of slaves. But slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors. Wherefore the deduction can not be allowed.

The tutor does not owe the interest claimed on the sums which came into his hands. They were not revenues, but merely a capital representing the total of the minors' inheritance, which was nearly absorbed by necessary expenses for the minors, by the payment of debts due by the successions of the minors' father and mother, and by the costs of administration. He can not be charged with interest on funds thus received.

Succession of Domitilde Hebert, 300.

4. The evidence showing that Linton resided in France, when and where he died, and that the only real estate he owned in Louisiana was situated in Rapides, his succession was properly opened in that parish.

Heirs who accept with the benefit of inventory, have no right to be put in possession of the property, until after the administration thereof is closed. *Succession of Stephen Duncan Linton, 351.*

5. The heir being considered seized of the succession from the moment of its being opened, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession, and each of the heirs becomes an undivided proprietor of the effects of the succession for the part or portion coming to him, which forms among the heirs a community of property as long as it remains undivided, and the recording of a judgment against an heir must be held to affect all mortgageable property thus owned by such heir. *Smith & McKenna v. Charles, 503.*

6. Against a succession a writ of *fiery facias* can not issue, nor can a seizure thereunder be made by garnishment process.

Levy & Sugar v. Cowan & Mayo and Mayo & Hodge. Collin Knox et al. garnishees, 556.

SUCCESSION—Continued.

7. In this instance, if the accountant saw fit to file an amendment to her original account, it was but just that the opponents should have the right to oppose it, and for that purpose some delay was absolutely necessary. The judge *a quo* did not err in overruling the objection to the granting of the delay; nor was the objection to the permission to amend, if it be so regarded, better founded. No injury could result to any one, and it was the interest of all parties that an end be put to this litigation.

The fee allowed in the account, which was the object of the controversy, for defending the suit to reduce the legacy to the disposable portion, is not a proper charge against the estate. The testator having left *forced heirs*, the executrix might have learned from any member of the bar that the bequest of the usufruct of the *whole* of his property was reducible, and there was no necessity for defending such a suit, at least by the *executrix*. If the *legatee* chose to defend, it was to be at his own costs.

The opposition to the credit claimed for commissions due to the executrix should be maintained, as she is a legatee under the will.

Succession of David Hasley—Opposition of Heirs to Provisional and final account, 586.

Newman having died without forced heirs, giving by his will to his widow, the present Mrs. Hasley, the usufruct of his estate during her life, and the property itself to some of his heirs, and Hasley, after his marriage with widow Newman, having bought the rights and interests of all the heirs and legatees, these rights entered into the community then existing between Hasley and his wife, and at his death, one-half thereof belonged in full ownership to her, and the other half belonged to his heirs, subject to her usufruct, created by the will of Newman, her first husband. The *naked property* of this half interest in and to the property of Newman belongs to the heirs of Hasley, and she should be charged with its inventoried value.

As the community owned only the *naked property* to one-half of the estate, consequently the community owed Mrs. Newman, in addition to the price of her half of the property, the value, whatever that may be, of the usufruct of the property sold. No confusion ever took place as to the usufruct of Mrs. Newman, as *she* never purchased the naked property. The *community* and *she* were distinct and separate persons.

In the absence of other proof as to the value of the usufruct of such property, this court will consider the interest allowed by law for moneys due, as the value of such usufruct, and this the accountant is entitled to in addition to the half of the price of said sales.

Ibid, 586.

SUCCESSION—Continued.

Charges for the value of timber standing on the separate lands of the wife at the time of her marriage, and after that cut and sold, were properly allowed. The timber, before being cut, belonged to the wife, and its value received by the husband is a proper charge against the community.

The judgment of the court *a qua* giving the executrix five per cent. per annum interest on all the items allowed to her for paraphernal property disposed of by the husband, is wrong. Interest should be allowed only from the dissolution of the community, as the interests before that period entered into the community.

There being no debts due by the estate, that portion of the judgment of the court *a qua* which prolongs the administration of the executrix, to collect the notes and judgments due to the estate, is wrong. The administration should be closed, and the property should be turned over to those entitled to it as soon as possible. *Ibid*, 586.

8. In this instance the account and tableau of distribution, to which there are three oppositions, were homologated so far as not opposed. But this order or judgment was not signed, so far as this record shows.

This omission or neglect is attempted to be supplied by a memorandum in the following words written on the margin of the page on which the unsigned judgment of homologation is found: "The original of this judgment having been duly signed on the account, was lost or mislaid. J. G., Deputy Clerk." This certificate or memorandum is unauthorized by law, and can not supply the defect or omission. If the judgment was signed the fact should have been proved, like any other fact, by legal evidence.

Besides, it appears that the account was homologated without proof, except that the account had been advertised.

The administrator having appropriated the proceeds of the personal as well as real property of the succession to the payment of a judicial mortgage, to the exclusion of the ordinary creditors, the judge *a quo* correctly maintained the opposition of Claffin & Co. to this distribution, and directed that only the proceeds of the real property be applied to the payment of the judicial mortgage, and that the proceeds of the personal property be distributed among the creditors.

The court *a qua* did not err in rejecting the claim of Thomas Dugan for a privilege. Dugan had rented a store to the deceased, and the claim, to secure which he pretends to have a privilege, was for damages done to the building. If the law gives a privilege for such a claim (unliquidated damages) the claim was not recorded, and the personal property in the leased premises had been removed.

Succession of Michael R. Haggerty. Oppositions to Account of Administrator, 667.

SUCCESSION—Continued.

9. Where the heirs of a succession have been recognized by a judgment of the Second District Court, parish of Orleans, and put in possession of the property, an action for debt due from said succession must be brought before the ordinary tribunals against the heirs themselves, if they be of age, or against their tutor.

Charlotte Pauline Emelie Romaine De La Ferriere v. Succession of R. England, 686.

SEE OBLIGATIONS AND LIABILITIES, NO. 14—*Stevenson v. Lavinia Edwards et al.*, 302.

SEE EXECUTOR, NO. 1—*Succession of James N. Brown*, 328; AND NO. 2—*Wells v. Annie Alexander and Husband*, 624.

SEE EVIDENCE, NO. 22—*Josephine H. Ames v. James Hale*, 349.

SEE WIDOW, NO. 1—*Succession of John O'Loughlen*, 364.

SEE JURISDICTION, NO. 13—*Succession of Joseph Ricard*, 365.

SEE MORTGAGE, NO. 13—*Succession of Gayle*, 547.

SEE SALES, NO. 22—*R. Green v. Baptist Church of Shreveport*, 563.

SEE ADMINISTRATOR, NO. 9—*Succession of Everett Miller*, 574.

SEE ACTION, NO. 11—*Lay et als. v. Succession of Elias O'Neal*, 643.

SURETY.

1. In this instance the main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court as to discharge one of them, the Delta Newspaper Company, and hold the other two liable jointly and not *in solido*, and therefore the surety is not liable for the amount of the judgment so rendered. The Code of Practice provides that the appellant shall satisfy whatever judgment may be rendered against him, and that the surety shall be liable in his stead. The language used is plain and expressive—that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law. The defense he sets up is more specious than weighty. *Culver, Simonds & Co. v. Leovy, Hart et al.*, 58.
2. This suit is brought against the sureties of a late sheriff to recover the amount of a judgment rendered against him. The main defense is the prescription of two years, pleaded under section 3546 of the Revised Statutes.

It is true that the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, the sheriff, was, and this interrupted prescription as to them.

SURETY—Continued.

Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal.

Cohen & Wilson v. William Golding and Francois Lacroix, 77.

3. The judge *a quo* erred when he refused the surety the right to have the property of the principal discussed, he having pointed out the same and furnished the necessary money.

Jesse A. Mathews v. Peter H. Kemp et al., 203.

4. Parol and written evidence in this case shows that defendant's obligation was that of surety, for when one "accedes to the existing obligation of another, and engages to see it performed, he becomes essentially a surety."

It is the essence rather than the form of a contract which must determine its character.

"Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not." Such seems to have been the obligation assumed by defendant. The renewal of the note without the consent of the surety, discharges him.

Charles E. Alter v. James E. Zunts, 317.

5. The objection that plaintiff can not proceed by rule to compel the surety on the appeal bond to pay the judgment in her favor, but must resort to a regular action, is answered adversely by the textual provision of section 37 of the Revised Statutes and the settled jurisprudence of the State.

The second objection that the court was without jurisdiction in this case, is also answered adversely to respondent, in precise terms, in section 3679 of the Revised Statutes.

It has been frequently held that where the creditor can not take out execution against the principal on the appeal bond, as in this case, he may proceed directly against the surety.

The only really important question in this suit is, does the surety on a suspensive bond in an appeal taken by an administrator or an executor from a judgment for a specific sum of money, become liable for the debt in case the judgment is affirmed? The answer is affirmative. The case at bar falls within the express provision of article 575 of the Code of Practice. The succession of Massieu was sued on a promissory note, and it was condemned to pay plaintiff ten thousand dollars, a specific sum.

Where a bond is given in reference to the law, stipulations unauthorized thereby will not invalidate it.

The assumption that the legal obligation of the succession on the note and judgment held by plaintiff is only commensurate with the ability of the succession to pay it, is a fallacy. The obligation

SURETY—Continued.

of the surety's principal—the succession of Massieu, a judicial person—is to pay the whole debt, regardless of its ability to do so. Therefore the respondent on the rule is liable on the appeal bond for the amount of plaintiff's judgment.

Mrs. E. LeBlanc v. Succession of Charles Massieu—On rule against John Palsey, security on appeal bond, 324.

6. The defense of the surety on an appeal bond furnished by the plaintiffs, on the ground that the necessary proceedings were not had against the principals, can not be sustained, two executions having been issued without effect, and the United States Circuit Court having specially enjoined the execution of any writ against the plaintiffs.

New Orleans, Mobile and Chattanooga Railroad Company v. T. S. Dugan, 465.

7. An injunction, which was subsequently dissolved, was obtained in the parish court of the parish of Morehouse, by Walker and Vaught, and an injunction bond for \$500 given, with R. B. Todd as security. This suit is to make both principals and surety responsible in damages for the injunction wrongfully taken, without regard to the amount specified in the bond.

As to Walker and Vaught, the principals, the plea to the jurisdiction of the court was properly maintained. They must be sued at their domicile, which is New Orleans.

As to the security, who resides in the parish, the plea to the jurisdiction *ratione materiae* is not tenable. It is the demand which must test the jurisdiction, and the demand in this case is over \$7000, the plaintiff contending that the liability of the security is not limited to the bond.

The plea of *res judicata* is not tenable, because in the cases cited and in which it is alleged that the cause of action now presented had been pleaded, nothing was said in regard to damages, as that question was not properly at issue.

Kimbrough, Administrator, v. Walker et als., 566.

8. The plea that the securities are not bound because their principal was not legally collector, and because much of the money collected as licenses and fines had not been legally assessed, can not be maintained.

These questions can not be raised in this collateral manner. It is a fact that the principal on the bond did act as collector, at least under color of authority, and that he did collect the licenses and fines imposed by those who were acting under color of authority. He must account for the moneys collected by him, even though unduly collected, and the sureties bound themselves to do so if he did not.

SURETY—Continued.

There is no merit in the defense that the sureties are bound only for such moneys as the principal collected during the first month of the term of his office, as he was required by law to make monthly settlements. It is evident that a violation of duty by the principal can be no excuse for the sureties, who are bound for the consequences of all violations of his duties.

The Mayor and Selectmen of the Town of Homer v. T. S. Merritt et als, 568.

9. The sureties on a suspensive appeal bond can be made liable where execution issued on certificate of the non-filing of the transcript by the appellant and the money could not be made after taking necessary steps against the principal.

Moore, Janney & Hyams v. Louis Lalaurie, 645.

10. Where the evidence showed that the existing liabilities of the surety on the appeal bond exceed his assets in this State, but where he testifies that he has in another State of the Union property worth a sum much larger than all his liabilities;

Held—That he is a good surety in this State. The law does not require the property of the surety, but only the person or residence of the surety to be within the State.

State ex rel. Liquidators of Salamander Insurance Company v. Judge of the Fourth District Court, parish of Orleans, 662.

11. The judge *a quo* dismissed the suspensive appeal granted, on the ground that the surety on the bond was not the owner of tangible property to the amount of the bond within the jurisdiction of the court. There seems, however, to be no question of the solvency of the surety. It is proved that the surety is worth the amount of the bond and that he resides within the jurisdiction of the court. This is all that the law requires.

State of Louisiana ex rel. G. A. Fosdick v. The Judge of the Sixth District Court, parish of Orleans, 685.

12. This is a suit, by rule, to compel a surety on an appeal bond to pay the remainder of the judgment, which had been affirmed on a suspensive appeal from an order of seizure and sale.

If the position taken be correct, that the proceedings against the surety was premature, as only the mortgaged property had been sold under the writ, and no execution had been issued against the judgment debtor and returned *nulla bona*, then to require bond for an appeal from an order of sale is an idle form.

Article 575 of the Code of Practice and section 37 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued, was issued and returned not satisfied. The

SURETY—Continued.

requirements of the law were substantially complied with. The surety knew that, under the executory process, no other property could be sold except that which was included in the mortgage, and when he stopped that by signing the appeal bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

- By reason of the nature of the judgment, no execution could be taken out, after the return of the order of seizure and sale, which could reach the property of the debtor, and therefore plaintiff had the right to proceed immediately against the surety on the appeal bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation.

Georgiana Whan v. Jesse R. Irwin, Tutor, et al., 706.

SEE BONDS No. 7—*Canal and Olaborne Streets Railroad Company v. Succession of Armstrong*, 433.

TAXES AND TAX COLLECTORS.

1. Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue.

The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873, provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the legislator for enforcing a right of the sovereign and is *due process of law*.

The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. Robert K. Anderson, 18.

2. Nathaniel Montross, of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison to secure the payment of promissory notes on which this suit was brought. The mortgaged property was sold and adjudicated to the plaintiffs. The amount due on the debt for which the property was seized, was paid, and the remainder of the proceeds of the sale was retained to pay prior encumbrances. The city of New Orleans claimed as due for unpaid taxes against the property a certain sum of money, with interest and costs and attorney's

TAXES AND TAX COLLECTORS—Continued.

fees, and alleged the city's right to be paid in preference to any other creditors. The State tax collector for the First District of New Orleans excepted to the jurisdiction of the court, showed that the State has a first privilege upon the property for all taxes and can not be called in as an ordinary creditor, as aimed at by plaintiffs.

But Smith & Co., who held certain mortgage notes, drawn by Jamison and secured also by first mortgage, took executory proceedings against the said property which plaintiffs have enjoined. They have made parties to this suit, as in a kind of *concursum*, the city of New Orleans, claiming a sum due for taxes, also the State tax collector of the First District of New Orleans and Nathaniel Montross, holder of the notes and mortgage under which the property was sold, and they have prayed that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison, according to their respective rights of mortgage and privilege.

The court *a qua* maintained the exception of the State tax collector, gave judgment in favor of the city for a certain amount of taxes with lien and privilege on the property, and dissolved plaintiffs' injunction.

- The judge below erred only so far as he gave judgment in favor of the city for taxes. It would be in time after the execution of the order of seizure and sale now pending to present the claim for taxes, reserving to the city her right to be paid the taxes due out of the proceeds of the sale when made.

Hibernia National Bank et als. v. Smith et als., 59.

3. This is a suit to force compliance with the terms of adjudication of property. The defense is want of title in the seller, the administrator of the Trainor estate. Trainor bought the lot about which the dispute is as to title at a tax sale made in August, 1860, at the suit of the city of New Orleans for city taxes. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The provisions of these acts not having been complied with in the tax sale, it follows that the evidence does not establish a valid title in the succession of Trainor.

Successions of John and Mary Trainor, 150.

4. The title to the act No. 7 of the extra session of 1870 is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and as a consequence the prescribing of the city limits or boundaries.

Cities may properly be extended in their boundaries as need or convenience may require. The extension of their boundaries may, as

TAXES AND TAX COLLECTORS—Continued.

in the present case, include rural districts, the condition of which is very materially different from the character of city property.

Taxation must be equal and uniform, but the ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least a difficulty that is never clearly and satisfactorily removed.

The principle is well settled and the doctrine established, that a Legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike.

The tax in dispute in this case has been imposed since the city charter of 1870 which makes it the duty of the City Council to lay an equal and uniform tax upon all real and personal property in said city.

From these well-settled principles and the law applicable to this case, it must be concluded that the objections urged against the constitutionality and legality of the tax in question are untenable.

• *City of New Orleans v. Pierre Caselar*, 156.

5. It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school, or charitable purposes, by implication prohibits the General Assembly from exempting property not actually used for such purposes.

The exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State. It means a complete and not a partial exemption, and this limitation must apply to the power of taxation previously delegated to the municipal corporations of the State.

• *Mr. and Mrs. Lefranc v. City of New Orleans*, 188.

6. It is a rule of general jurisprudence, as well as a principle of public policy, to construe the redemption laws liberally. The object of the State is to collect the revenues, and not to deprive its citizens of any rights.

It is not to be deduced from the act No. 47 of the acts of 1873 that it takes away from creditors and all other parties interested, except the owner, the right of redemption which they had formerly enjoyed. If a mortgagee is a species of owner or quasi owner, as the doctrine is, he is embraced in the exception made by the express words of the statute.

To adopt a different conclusion it should clearly appear that the

TAXES AND TAX COLLECTORS—Continued.

State, which has declared that the property of the debtor is the common pledge of all his creditors, intends by the process of collecting the contributions of its citizens and inhabitants to defeat absolutely all the rights of creditors upon property subject to those contributions. The right of the State to its necessary revenue is paramount, but it is to be exercised with a strict regard to those other rights which the State itself has granted or guaranteed, especially of parties not delinquent, except it expressly declares otherwise for exigencies which make the declaration necessary. Therefore the right of redemption still exists in the owner or quasi owner under the prescribed conditions.

It being shown that the defendant has a residence both in New Orleans and West Virginia, spending a large portion of the year in that city, and attending to mercantile and other business, the tender to effect redemption by plaintiff was properly made at the residence of the defendant in New Orleans, as it does not appear that he had an agent to represent him in such matters.

The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses.

The plaintiff should not, under the circumstances of the case, be concluded by her refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur.

Charles E. Alter v. Henry Shepherd et als, 207.

7. Tax payers have a right to appeal from a judgment rendered against the parish, and in which a special tax is decreed.

A bare inspection of the record was sufficient to indicate an appeal as the course for the district attorney *pro tem.* to pursue, in view of his duty as an officer protecting the legal rights of his client, the parish of St. Charles. He took no appeal, however, and when the tax payers of said parish sought to exercise that right, not content with his own inaction, he joined the plaintiff in an effort to defeat the appeal, to the prejudice of his client, the parish of St. Charles. This is an extraordinary feature; the conduct of that public officer is reprehensible.

There is no proof in the record that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury.

If the warrants or certificates were authorized to be issued, they are not sufficient to justify the judgment of the court below. Police juries, in the administration of the limited powers confided to

• TAXES AND TAX COLLECTORS—Continued.

them, must provide means by taxation for the purpose and in the manner provided by law. They can not bind the parishes by putting in circulation their notes or warrants at pleasure.

O. J. Flagg v. The Parish of St. Charles, 319.

8. The position taken by the plaintiff that the tax collector has no right to sell forfeited lands, is not correct. It has already been decided that when the plaintiff repudiates his own title and sets up that of the State, he shows no cause to complain, and if the tax collector has no authority, as he alleges, to sell forfeited lands, there will be no divestiture of title, and no injury can result, at least to the plaintiff.

The tax collector charged with the duty of collecting all the taxes, the delinquent list included, has authority to sell forfeited lands, reserving to the former owner the right of redemption according to the statutory provisions on the subject. The decision given in the case of *Hall v. Hall*, 23 An. 135, has no bearing on the statutes under consideration, because they were enacted subsequent to the controversy in that case.

Frank S. Garner, Administrator, v. R. K. Anderson, Tax Collector, 338.

9. The tax collector is entitled to charge \$2 for each deed of sale which he effects, but when one person buys all of a tract of land containing two thousand acres, and gets one deed, the tax collector is not allowed to charge for forty deeds under the supposition that the property has been subdivided into fifty-acre lots.

The State ex rel. P. S. Wills, Agent, etc. v. Charles Olinton, Auditor, 362.

10. The bank of Lafayette was organized since the adoption of the constitution of 1868. Article 118 of that instrument declares what property may be exempted from taxation. Any law which is in conflict with that article, whether passed before or after the adoption of the constitution is stricken with nullity thereby, unless the law created a contract with the other party, whose property is exempted before the adoption of the constitution.

City of New Orleans v. Bank of Lafayette, 376.

11. The State has the power to establish a police for the various municipal corporations which she has created and which she employs in the administration of government. As she could establish a police department in every parish of the State, no reason can be seen why she could not pass an act establishing a Metropolitan Police district composed of the municipal corporations (cities and parishes) mentioned in the act on the subject, and require the expenses thereof to be apportioned among them severally in pro-

TAXES AND TAX COLLECTORS—Continued.

portion to the number of policemen employed in each. This has been done in the acts of 1868 and 1869, establishing and regulating the Metropolitan Police district.

It is not pretended that plaintiff is required to pay a greater tax than any other citizen in the parish of St. Bernard, nor is there any proof showing that the apportionments assessed by the police commissioners for the years 1869 and 1870 are not just and in proportion to the number of officers and policemen assigned to police duty in said parish during said years. So that plaintiff, not being required to pay an unequal tax for the expenses of policemen actually employed for the public welfare in the parish of St. Bernard, has no cause to complain; none of his constitutional rights have been violated.

Hyppolyte Gally v. Leopold Guichard, Tax Collector, 396.

12. The question in this case is not about taxing the lots of ground which belong to the Poydras Female Orphan Asylum, but about taxing the buildings and improvements thereon, placed there under a contract which makes them the property of the lessee and therefore liable to taxation thereon. There is no doubt about the right of the city to collect taxes on said property from the defendant.
City of New Orleans v. S. P. Buss, 413.

13. The State when selling a certain piece of property for taxes of 1871, due thereon, did not sell it freed from the taxes of 1872. The State had a concurrent mortgage and privilege to secure the taxes due for both years, and the sale did not purport to release the taxes of 1872. The former owner might have redeemed his land by complying with the requirements of the law after the sale, but he could not have taken the property back freed from the taxes of 1872. The purchaser bought the property subject to the taxes of that year.

Charles McAllister v. R. K. Anderson, Tax Collector, 425.

14. The property of the defendants is not exempted from taxation by their charter. There are no terms or expressions used in their acts of incorporation declaring a contract between the State and the incorporators, and the existence of such a contract can not be inferred, nor has the property been used for the specific purposes expressed in the acts of incorporation, and which was the condition of an exemption from taxation.

City of New Orleans v. The New Orleans Mechanics' Society, 436.

15. In this instance the claim of the plaintiff against the defendant, tax collector, for uncollected taxes and licenses, is unfounded in law and equity. If the defendant is responsible to the plaintiff for the uncollected taxes, the defendant would have the right to

TAXES AND TAX COLLECTORS—Continued.

continue to collect them after his removal from office—which he can not do.

There is no evidence that the defendant received the warrants in payment of taxes, which he tendered in settlement, or that he was authorized to receive them. They were therefore properly refused by the treasurer in settlement of taxes collected.

The defendant was the agent of the parish, and he is bound to return to the parish the amount of taxes he received in currency, and the court will presume that he received currency, unless the law authorized the receipt of warrants in payment of taxes and the evidence showed that he actually received warrants in settlement of the taxes. Tax collectors can not be permitted to speculate in parish warrants.

Parish of West Baton Rouge v. Robert Morris, 459.

16. The tax bill on which this suit is brought is made out against the City Hotel, R. S. Morse and James E. Zunts. The judgment was that the City Hotel, etc., is hereby condemned to pay, etc. This proceeding was had in the case entitled the city of New Orleans v. City Hotel, R. S. Morse and James E. Zunts, who have appealed on the ground that they know of no law which justifies a judgment against property the owners of which are not unknown.
- There can be no doubt, under the circumstances, that the appellants were the parties who were condemned in the judgment, which must be construed with reference to the pleadings in the case and the obligation sought to be enforced. This is necessarily implied in their application for an appeal.

It is just as much the duty of the plaintiff as of the defendants to see that the clerk of the court, or the judge, makes no error in entering the judgment.

City of New Orleans v. City Hotel, R. S. Morse and James E. Zunts, 470.

17. Because the defendant is required to pay a license, it is no reason why property owned by it should not be taxed like other property of the city of New Orleans.

City of New Orleans v. The People's Insurance Company, 519.

18. The only question in this case is, whether municipal taxes for 1873 on the capital stock of the People's Bank can be imposed. It must be answered in the affirmative. In 1869, when the defendant, the People's Bank, was incorporated under the act of the fifteenth of March, 1855, entitled an act to establish a general system of free banking in this State, the statute of 1857 exempting free banks from municipal taxation had been stricken with nullity by article 118 of the constitution of 1868. Such exemption formed, therefore, no part of the contract arising from the act of incorporation.

TAXES AND TAX COLLECTORS—Continued.

Defendants contend erroneously that there is no statute authorizing the municipal taxation of a banking institution, and that the ordinance passed by the city without the sanction of such law is absolutely void.

The capital of a bank is its property and is liable to taxation unless specially exempt.

By section 12 of the charter of 1870 the city of New Orleans is authorized and required to "*levy an equal and uniform tax, for the purposes of this act, on all property, real and personal, in said city.*" * * *

The City of New Orleans v. People's Bank, 646.

19. The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the exemption from taxation, and there is no conflict with the constitution in levying the present tax.

City of New Orleans v. Metropolitan Loan, Savings and Pledge Bank, 648.

20. The city of New Orleans, by a special act No. 73, April 26, 1872, is declared not to be restrained in requiring a license from the Insurance Companies within her boundaries, by either the act No. 42, March 3, 1871, or act No. 14, March 8, 1872, which provided for the general revenue of the State, and on which defendant relies in the suit instituted against it by the city of New Orleans for the recovery of a license tax.

City of New Orleans v. Globe Mutual Life Insurance Company, 656.

21. This is a suit to annul a tax sale by a justice of the peace and recover the property thus disposed of. All property seized under writs of justices of the peace, whether the same be movable or immovable, must be appraised and sold in the same manner as property seized and sold by sheriffs. None of the formalities required and made necessary by law to constitute a seizure by the sheriff or other officer of the parishes of Orleans and Jefferson having been complied with in this case, it follows that nullity of the sale is the consequence.

As defendants in their answer set up no reconventional demand for taxes paid by them since their pretended purchase of the land herein decreed to belong to plaintiff, no relief can be given in that regard.

Thomas McNeil v. Peter J. Kramer et als. City of New Orleans in Warranty, 678.

22. A suit for taxes is summary and is not to be tried by a jury.

City of New Orleans v. Hugh Cassidy, 704.

23. There is nothing in the act creating the Superior District Court, which confines to that court the proceeding of relator, asking for an order to the sheriff to put relator in possession of certain real

TAXES AND TAX COLLECTORS—Continued.

estate which he alleges to have purchased at a tax sale of the same by the tax collector under the provisions of act No. 47 of 1873, entitled an act to enforce the payment of taxes due the State, etc. The Fourth District Court for the parish of Orleans is a district court in contemplation of the act No 47, invoked by relator, being a district court of general civil jurisdiction.

The act does not declare in express terms that the order to the sheriff to put a purchaser in possession shall issue without notice, and this court may well construe it as adopted with reference to the general laws relating to summary proceedings in the courts of this State. Hence no constitutional question arises.

The judge *a quo*, in this instance, did not err in refusing to issue the order as prayed for, because no party was made to the proceeding upon whom notice could be served. Consequently there is no proper showing for the writ of mandamus to issue from this court.

State of Louisiana ex rel. George O. Norcross v. Judge of the Fourth District Court, Parish of Orleans, 704.

24. This court can not perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in the State has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law; for the effect would be the same.

Probably there never has been an assessment which embraced *all* the property of the State, but that fact did not render the assessment unconstitutional. When the omission is discovered, the property must be assessed, for the constitution and laws require that all property shall be assessed.

Certain questions discussed in this controversy can not be considered by this court, as they do not relate to the legality or unconstitutionality of the law, but relate to questions of fact, such as whether the Auditor made accurate calculations for the purpose of the assessment for taxes, or exceeded his authority, as the amount in dispute is less than five hundred dollars; wherefore this court has not jurisdiction for that purpose.

The defendant can not raise the question concerning the legality of the warrants to pay which the one-mill tax is said to be levied, as the holders of said warrants are not parties to this suit; and the amount of revenues to be raised is a matter within the legislative discretion.

State v. Maxwell, 722.

SEE MANDAMUS, No. 4—*State ex rel. Macaulay v. Charles Olin-ton, Auditor, 429.*

METROPOLITAN POLICE WARRANTS, No. 1—*Louisiana National Bank v. City of New Orleans et als., 446,* and No. 2—*State ex rel. Lubie v. Administrator of Finance, City of New Orleans, 493.*

TELEGRAPH COMPANY.

1. This is a suit to recover the amount of losses sustained in consequence of incorrect information given by defendants, in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York. The defense is, that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company placed for convenience in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. This does not exonerate them from liability, because by their contract they were bound to carry to plaintiffs correct information, which they could have obtained without relying on the indicator.

Bank of New Orleans v. Western Union Telegraph Co., 49.

TENDER AND CONSIGNMENT.

1. The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses.

The plaintiff should not, under the circumstances of the case, be concluded by her refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur.

Alter v. Shepherd et al., 207.

TUTORSHIP.

1. The property of a cotutor is not subjected to the legal mortgage of the minor. But, by the term cotutor, must be understood the person who becomes so by the fulfillment of the requirements of law.

Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutorship *ipso facto*. In such a case, the children of a previous marriage have a legal mortgage on the property of the new husband for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

W. Bodein Keene v. George Guier and Sheriff, 232.

2. Because a cotutor is liable to account for property belonging to minors which may have come into his hands, it does not follow that he can not be appointed their tutor by testament.

The declaration of three of the five members of a family meeting

TUTORSHIP—Continued.

called in the interest of the minors, that that the appointed tutor is not a fit person to have charge of the minors, can not be taken into consideration. In the first place, there was nothing to authorize the family meeting, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. This court can not say in advance that the mother's choice of the person who, in her opinion, was best fitted to have charge of the minors, was ill-advised. *Succession of Mrs. S. B. Fuqua, 271.*

3. Celestin LeBlanc, who gave a note in part payment of a plantation and slaves, due in February, 1862, to Jules LeBlanc, father of the minors in this instance, of whom said Celestin subsequently became the tutor, charges himself in his account with a large deduction on said note, on the ground that said note was given, in part, for the price of slaves. But slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors. Wherefore the deduction can not be allowed.

The tutor does not owe the interest claimed on the sums which came into his hands. They were not revenues, but merely a capital representing the total of the minors' inheritance, which was nearly absorbed by necessary expenses for the minors, by the payment of debts due by the successions of the minors' father and mother, and by the costs of administration. He can not be charged with interest on funds thus received.

Succession of Domitilde Hebert, 300.

4. It was improper for a tutor to use a mortgage note issued for a specific purpose on the minor's behalf as collateral security of an individual debt of his own unconnected with said minor's interest. The plaintiff was aware of these circumstances and therefore can not recover. *Temple S. Coons v. Joseph F. Kendall, 443.*

VICKSBURG, SHREVEPORT AND TEXAS R. R. CO.

1. This court is satisfied that the document sued on is the property of plaintiffs and not of the intervenors, by whom it was transferred, and not merely pledged to plaintiffs, as he alleges, to guarantee the payment of the indebtedness of a third party.

The position taken by the intervenor that the obligation sued on was not stamped when it was delivered to plaintiffs, and that it is therefore a *nudum pactum*, is entirely untenable. If he gave them the obligation without being stamped, when stamps should by law have been placed upon it, it was a wrong doing of his own from which he can draw no protection. Besides, the plaintiffs had the

VICKSBURG, SHREVEPORT AND TEXAS R. R. CO.—Continued.

right to cause the required stamps to be put upon it. The requirements of the law are complied with, if the stamps are on the obligation when sought to be enforced.

Allegations that intervenor, when he parted with the obligation, which was negotiable, and of which he claims the ownership, did so despite the agreement he was under with his associates to keep it out of commerce, can do him no good, and he can not be listened to on this point.

It is conceded that the defendants, with others, at sheriff's sale, purchased all the rights, privileges, franchises and other property belonging to the Vicksburg, Shreveport and Texas Railroad Company. This company was a corporation established by law. As a corporation thus established, its members were not personally responsible for the debts of the company beyond the amount of stock which they individually held.

As to the defendants, they did not acquire by their purchase the immunity of the stockholders of that company from liability beyond the amount of their stock. This purchase conveyed to them all the rights, privileges, franchises and other property of said company; but it did not and could not make them a corporation, for corporations are created only by special act of the Legislature, or in the manner provided for by law. As regards the rights, privileges, franchises and other property of the company aforesaid, the purchase made defendants joint owners thereof and nothing else. It did not make them that company.

If, as alleged, the ratification of the sale by the State constituted them a corporation, their corporate rights would take effect only from the passage of the act. But the act was passed subsequently to the publishing of the instrument sued upon. The rights of the holders of the obligation had vested, and the Legislature could not shake them.

Defendants' plea that the obligation sued on purports to have been issued by the Vicksburg, Shreveport and Texas Railroad Company, and therefore that they, the defendants, can not be liable individually, does not protect them. Obligors are bound not by the style which they give to themselves, but by the consequences which they incur by reason of their acts.

It was sufficient that the instrument sued upon was stamped when offered in evidence.

This court can neither add to the law nor take from it, and as the law limits the solidarity of obligors engaged in carrying personal property for hire, to that property which is carried on ships, or other vessels, it can not be extended to those who carry it on a railroad. Hence the defendants are liable jointly, and not *in solido*.

VICKSBURG; SHREVEPORT AND TEXAS R. R. CO.—Continued.

It appears that others besides the present defendants are the owners of this road. Their names were given to the plaintiffs by the defendants. They should have been made parties to the suit. The owners are nine in number. Judgment is therefore rendered in favor of the plaintiffs and against the defendants for the proportion due by each.

John Chaffe & Brother v. John T. Ludeling et als. W. J. Q. Baker, Intervenor, 607.

WALL IN COMMON.

1. This is a contract about a wall claimed to be in common. Buckner bought only what his vendors could sell. Not having paid one-half the cost of erecting the wall, they did not own half of it, and could not sell the half thereof. Buckner's ignorance of the want of title to one-half of the wall in his vendors should not prejudice the plaintiffs, if it operate a hardship to him. His becoming owner of all the premises owned by his vendors conferred no immunity upon him to use the wall as a wall in common, free of charge. He acquired by his purchase only the right which his vendors had to make the wall one in common, by paying half the cost of erection. Availing himself, as it seems he has done, of the benefit of the wall, it is but fair he should pay for one-half the expense incurred in building it.

Ohism & Boyd v. P. J. Lefebre, 199.

WIDOW.

1. Under article 3252 R. C. C., which says: "The widow or legal representatives of the children shall be entitled to demand and receive from the successor of the deceased husband or father a sum which, added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars," the proof should have shown that, in this instance, the widow also had no means, or, if she had any less than one thousand dollars, what it was. Her demand should be rejected on that ground; nor can the demand be made by the attorney for the absent heirs. The legal representatives of the children would be their tutors.
Succession of John O'Loghlen, 364.
2. The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor, and those to secure the payment of expenses incurred in selling the property.
Succession of George W. Rawls. Opposition to Tableau of Debts, 560.
3. The plea to the jurisdiction is without weight. The demand of the opponent under article 2382 of the Revised Code for a marital

WIDOW—Continued.

portion is not the action of a creditor against a succession. It is the portion which the law allows in the settlement of a succession to the surviving spouse in necessitous circumstances where the deceased died rich. It is a right which must be asserted in the court charged with the settlement of the succession.

Succession of Callie N. Newman. Opposition of G. W. Newman, 593.

SEE WILLS AND TESTAMENTS, No. 1—*Succession of Hampton Elliot, 42.*

WILLS AND TESTAMENTS.

1. The property in controversy and claimed by Davis, belonging to the succession of Elliot, whose domicile was in Adams county, State of Mississippi, and it being undoubtedly the purpose of Elliot, in making the assignment under which Davis claims, to conceal his property from his wife, whom he had abandoned, the court *a qua* did not err in rejecting his demand.

The title set up by Mrs. Risley, the second claimant, can not be considered a valid will. It is written in pencil on a small piece of paper; the intention of the party to make a will is not manifest, and there is no *corpus* on which a will can operate. The notes referred to in the writing are not those involved in this suit. Therefore the court below did not err in declaring the writing void as a will and setting aside the probate thereof.

The will relied on by Mrs. Burke, a third claimant, is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made. It is not sufficiently proved that the parties lived in open concubinage and were therefore not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

The rights of Mrs. Elliot, the surviving widow and fourth claimant, must be determined by the laws of Mississippi. According to those laws, said widow is entitled to one-half of the personal property of the deceased.

The immovable property is controlled by the laws of this State and passed under the will to Mrs. Burke.

Succession of Hampton Elliot, 42.

2. The motion to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk can not prevail. The bond was executed in favor of John S. Lanier, whom the record shows to be clerk.

WILLS AND TESTAMENTS—Continued.

The peremptory exception to the jurisdiction of a special judge to issue an order granting letters of executorship *ratione materiam* properly overruled. Under the facts of this case the parish judge proceeded lawfully in selecting a lawyer having the proper qualifications to preside over the trial in his place.

The instrument admitted to probate must be received as a will. It is in the olographic form, entirely written, dated, and signed by the testatrix. It is not essential that the date to an olographic will should precede the signature; it may be placed below.

There is no *fidei commissum* in the will. The testatrix does not attempt to put any property in the name of any person except her children. All she does is to direct how that property shall be administered until her children shall marry.

The intention of the testatrix expressed in her will is that her husband should have the entire control of her children; that they should make their homes with him, and that he should control their property until they married. Her wishes could not be carried out unless he was their tutor; hence it was, in intendment of law, his appointment as tutor. That she had the right to appoint him can not be doubted.

Because a cotutor is liable to account for property belonging to minors which may have come into his hands, it does not follow that he can not be appointed their tutor by testament.

The declaration of three of the five members of a family meeting called in the interest of the minors, that the appointed tutor is not a fit person to have charge of the minors, can not be taken into consideration. In the first place, there was nothing to authorize the family meeting, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. This court can not sit in advance that the mother's choice of the person who, in her opinion, was best fitted to have charge of the minors was ill-advised.

Succession of Mrs. S. B. Fuqua. 271.



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